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80-1900

No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

EULA MAE DENARD,
Petitioner and Plaintiff-Appellant,
v.
MICHIGAN NATIONAL BANK,
Respondent and Defendant-Appellee.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

I. Did the appellate court sanction the trial court's departure from the accepted and usual course of judicial proceedings so as to call for an exercise of this Court's power of supervision?

Petitioner says "Yes."

A. Did the trial court depart from the accepted and usual course of judicial proceedings by granting respondent's motion for summary judgment in lieu of conducting a trial on petitioner's claim that the respondent in processing and denying her application for a credit card violated the Equal Credit Opportunity Act with respect to her sex and marital status?

Petitioner says "Yes."

1. In view of the fact that respondent's own credit manual contraindicated respondent's avowed non-discriminatory reason for denying petitioner's credit application on the basis of a four-year old derogatory item appearing on petitioner's credit report, did respondent sustain its burden under FRCP 56 of establishing that there was no genuine issue of fact as to whether any aspect of its treatment of petitioner's application discriminated against her on the basis of her sex or marital status?

Petitioner says "No."

2. In view of the admission by respondent's credit analyst in deposition that petitioner's credit application had been treated more strictly than provided by respondent's credit manual, did respondent sustain its burden under FRCP 56 of establishing that there was no genuine issue of fact as to whether any aspect of its treatment of petitioner's application discriminated against her on the basis of her sex or marital status?

   Petitioner says "No."

3. In view of the fact that the practices of other established creditors contraindicated respondent's avowed non-discriminatory reason for denying petitioner's credit application, did respondent sustain its burden under FRCP 56 of establishing that there was no genuine issue of fact as to whether any aspect of its treatment of petitioner's application discriminated against her on the basis of her sex or marital status?

   Petitioner says "No."

B. Did the trial court depart from the accepted and usual course of judicial proceedings in entering summary judgment without addressing petitioner's two major discovery motions, critical to development of her proofs, with regard to information within the respondent's exclusive control, that had been pending for four months?

   Petitioner says "Yes."

1. Did the trial court depart from the accepted and usual course of judicial proceedings in not allowing petitioner to complete her discovery commenced in consultation with her experts more than ten months prior to the court's entry of summary judgment in respondent's favor?

   Petitioner says "Yes."

2. Did the trial court depart from the accepted and usual course of judicial proceedings in not enforcing its discovery order entered almost eight months prior to its entry of summary judgment in respondent's favor?

   Petitioner says "Yes."

C. Did the trial court depart from the accepted and usual course of judicial proceedings by ruling on the class certification question prematurely before the parties' major discovery disputes over information critical to the question had been resolved?

   Petitioner says "Yes."

1. Did the trial court depart from the accepted and usual course of judicial proceedings by not addressing the class certification question in terms of the specific parameters of FRCP 23(a) and (b)?

   Petitioner says "Yes."

II. Did the federal appellate court decide an important question of federal law — namely, a first impression interpretation of the Equal Credit Opportunity Act, which has not been, but should be settled by this Court?

Petitioner says "Yes."

A. Is the use of credit criteria, which are not properly validated, and which have an obvious adverse impact on the basis of a credit applicant's sex and marital status, probative in determining discriminatory intent in the evaluation of the aggrieved's application?

Petitioner says "Yes."

1. Should the trial court entertain expert testimony at trial to establish disparate impact, and how credit criteria are validated?

Petitioner says "Yes."

B. Is proof of disparate treatment of applicants of the same sex or marital status as the aggrieved applicant probative of discrimination against the applicant?

Petitioner says "Yes."

1. Should the trial court entertain expert testimony at trial as to how a properly conducted survey of a creditor's treatment of credit applications may show discrimination on the basis of the individual's sex or marital status?

Petitioner says "Yes."

C. Is the legal test of the Equal Credit Opportunity Act a bottom line test?

Petitioner says "No."

D. Does the creditor's disregard of information relevant to determining an applicant's credit worthiness and intimately linked to the applicant's sex and marital status violate the Equal Credit Opportunity Act's legal test, prohibiting sex or marital status discrimination in any aspect of a credit transaction?

Petitioner says "Yes."

1. Does a creditor's disregard of a state property law such as the Michigan Married Women's Property Act, which is relevant to evaluating an applicant's credit worthiness, and intimately linked to the applicant's sex and marital status, violate the Equal Credit Opportunity Act's legal test, prohibiting discrimination on the basis of sex or marital status in any aspect of a credit transaction?

Petitioner says "Yes."

2. Does the Act invest in the aggrieved applicant standing to seek declaratory and injunctive relief to require the creditor to consider such information in evaluating creditworthiness?

Petitioner says "Yes."

E. If a married or formerly married woman applicant 1) satisfies all the creditor's criteria, and 2) provides a satisfactory explanation that a derogatory item is attributable to her husband or former husband which is not predictive of her creditworthiness, should the creditor extend credit, in the absence of showing an unacceptable risk factor?

Petitioner says "Yes."

F. Does an individual credit applicant whose application has been pre-screened on the basis of credit criteria that adversely impact on the basis of her sex and marital status have standing to seek appropriate declaratory and injunctive relief requiring the creditor to validate its criteria?

Petitioner says "Yes."

G. Does the Congressional history of the Equal Credit Opportunity Act demonstrate a congressional policy to encourage class action enforcement?

Petitioner says "Yes."

1. Did the trial court err in deciding the class certification question without addressing the Congressional policy to encourage class action enforcement of the Act?

Petitioner says "Yes."

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GROUNDS ON WHICH JURISDICTION IS INVOKED

1. Federal jurisdiction is vested pursuant to 15 USC § 1691e(f) of the Equal Credit Opportunity Act.

2. The United States Court of Appeals for the Sixth Circuit, Hon. Albert Engel, Damon Keith, Gilbert Merritt, affirmed the judgment of the United States District Court for the Eastern District of Michigan, Hon. Robert DeMascio, by order entered November 12, 1980.

3. The Court of Appeals by order entered February 16, 1981, denied petitioner's petition for rehearing, and modified its Order of November 12, 1980. The petition for rehearing was submitted to the Court of Appeals on December 22, 1980, supported by the National Organization for Women, Detroit Chapter and the Women's Justice Center. The Court of Appeal's order of November 12, 1980 was entered only three weeks after oral argument on October 21, 1980. In contrast, the Court of Appeals had the petition for rehearing under advisement for eight weeks before denying it on the stated grounds of untimeliness. However, the Court of Appeals clearly reflected review of the petition by modifying in its order of denial a factual misstatement in its order of November 12, 1980, brought to its attention in footnote 9, paragraph 10 of the petition for rehearing. Accordingly, the time for filing the instant petition with this Court either dates from February 16, 1981 or is tolled during the period from December 22, 1980 to February 16, 1981 that the Court of Appeals had the petition for rehearing under advisement.

4. This is a civil case and this Court's jurisdiction is sought under 28 USC § 1254(1).

STATUTES AND REGULATIONS

Equal Credit Opportunity Act

15 USC § 1691a(1) provides:

Sec. 701. (a) It shall be unlawful for any creditor to discriminate against any applicant, with respect to any aspect of a credit transaction —

(1) on the basis of race, color, religion, national origin, sex or marital status, or age (provided the applicant has the capacity to contract);

15 USC § 1691a(c) provides:

(c) The term "Board" refers to the Board of Governors of the Federal Reserve System.

15 USC § 1691b(a) provides:

Sec. 703. (a) The Board shall prescribe regulations to carry out the purposes of this title. These regulations may contain but are not limited to such classifications, differentiations, or other provision, and may provide for such adjustments and exceptions for any class of transactions, as in the judgment of the Board are necessary or proper to effectuate the purposes of this title, to prevent circumvention or evasion thereof, or to facilitate or substantiate compliance therewith. In particular, such regulations may exempt from one or more of the provisions of this title any class of transactions not primarily for personal, family or household purposes, if the Board makes an express finding that the application of such provision or provisions would not contribute substantially to carrying out the purposes of this title. Such regulations shall be prescribed as soon as possible after the date of enactment of this Act, but in no event later than the effective date of this Act.

15 USC § 1691d(b) provides:

(b) Consideration or application of State property laws directly or indirectly affecting creditworthiness shall not constitute discrimination for purposes of this title.

15 USC § 1691d(f) provides:

(f) This title does not annul, alter, or affect, or exempt any person subject to the provisions of this title from complying with, the laws of any State with respect to credit discrimination, except to the extent that those laws are inconsistent with any provision of this title, and then only to the extent of the inconsistency. The Board is authorized to determine whether such inconsistencies exist. The Board may not determine that any State law is inconsistent with any provision of this title if the Board determines that such law gives greater protection to the applicant.

15 USC § 1691e(a), (b), (c), (d), (f) provides:

Sec. 706. (a) Any creditor who fails to comply with any requirement imposed under this title shall be liable to the aggrieved applicant for any actual damages sustained by such applicant acting either in an individual capacity or as a member of a class.

(b) Any creditor, other than a government or governmental subdivision or agency, who fails to comply with any requirement imposed under this title shall be liable to the aggrieved applicant for punitive damages in an amount not greater than $10,000, in addition to any actual damages provided in subsection (a), except that in the case of a class action the total recovery under this subsection shall not exceed the lesser of $500,000 or 1 per centum of the net worth of the creditor. In determining the amount of such damages in any action, the court shall consider, among other relevant factors, the amount

of any actual damages awarded, the frequency and persistence of failures of compliance by the creditor, the resources of the creditor, the number of persons adversely affected, and the extent to which the creditor's failure of compliance was intentional.

(c) Upon application by an aggrieved applicant, the appropriate United States district court or any other court of competent jurisdiction may grant such equitable and declaratory relief as is necessary to enforce the requirements imposed under this title.

(d) In the case of any action under subsection (a), (b), or (c), the costs of the action, together with a reasonable attorney's fee as determined by the court, shall be added to any damages awarded by the court under such subsection.

(f) Any action under this section may be brought in the appropriate United States district court without regard to the amount in controversy, or in any other court of competent jurisdiction. No such action shall be brought, later than two years from the date of the occurrence of the violation . . .

15 USC § 1691e(j) provides:

(j) Nothing in this title shall be construed to prohibit the discovery of a creditor's credit granting standards under appropriate discovery procedures in the court or agency in which an action or proceeding is brought.

REGULATION B

12 CFR § 202.2(m) provides:

(m) *Credit transaction* means every aspect of an applicant's dealings with a creditor regarding an

application for or an existing extension of credit, including, but not limited to, information requirements; investigation procedures; standards of creditworthiness; terms of credit; furnishing of credit information; revocation, alteration, or termination of credit; and collection procedures.

12 CFR § 202.2(n) provides:

(n) *Discriminate against an applicant* means to treat an applicant less favorably than other applicants.

12 CFR § 202.2(p)(1)(2) provides:

(p) *Empirically derived credit system.* (1) The term means a credit scoring system that evaluates an applicant's creditworthiness primarily by allocating points (or by using a comparable basis for assigning weights) to key attributes describing the applicant and other aspects of the transaction. In such a system, the points (or weights) assigned to each attribute, and hence the entire score:

(i) is derived from an empirical comparison of sample groups or the population of creditworthy and non-creditworthy applicants of a creditor who applied for credit within a reasonable preceding period of time; and

(ii) determines, alone or in conjunction with an evaluation of additional information about the applicant, whether an applicant is deemed creditworthy.

(2) *A demonstrably and statistically sound, empirically derived credit system* is a system:

(i) in which the data used to develop the system, if not the complete population consisting of all applicants, are obtained from the applicant file by using appropriate sampling principles;

(ii) which is developed for the purpose of predicting the creditworthiness of applicants with respect to the legitimate business interests of the creditor utilizing the system, including, but not limited to, minimizing bad debt losses and operating expenses in accordance with the creditor's business judgment;

(iii) which, upon validation using appropriate statistical principles, separates creditworthy and non-creditworthy applicants at a statistically significant rate; and

(iv) which is periodically revalidated as to its predictive ability by the use of the appropriate statistical principles and is adjusted as necessary to maintain its predictive ability.

12 CFR § 202.2(u) provides:

(u) *Marital status* means the state of being unmarried, married, or separated, as defined by applicable State law. For the purposes of this Part, the term "unmarried" includes persons who are single, divorced, or widowed.

12 CFR § 202.5(j) (eff. Oct. 28, 1975 to March 23, 1977) provides:

> *Credit History.* To the extent that a creditor considers credit history in evaluating applicants of similar qualifications for a similar type and amount of credit, *a creditor shall include,* in evaluating creditworthiness:
>
> The credit history of accounts designated under the requirements of § 202.6 as accounts which the applicant and a spouse are permitted to use or for which both are contractually liable, and, *on the applicant's request, any information the applicant may present tending to indicate that such history*

does not accurately reflect the applicant's ability or willingness to repay. (Emphasis added).

12 CFR § 202.6(6)(ii) provides:

(6) To the extent that a creditor considers credit history in evaluating the creditworthiness of similarly qualified applicants for a similar type and amount of credit, in evaluating an applicant's creditworthiness, a creditor shall consider (unless the failure to consider results from an inadvertent error);

(ii) on the applicant's request, any information that the applicant may present tending to indicate that the credit history being considered by the creditor does not accurately reflect the applicant's creditworthiness . . .

12 CFR § 202.7(b) provides:

(b) A creditor shall not prohibit an applicant from opening or maintaining an account in a birth-given first name and a surname that is the applicant's birth-given surname, the spouse's surname, or a combined surname.

12 CFR § 202.7(d)(1) provides:

(d)(1) Except as provided in this subsection, a creditor shall not require the signature of an applicant's spouse or other person, other than a joint applicant, on any credit instrument if the applicant qualifies under the creditor's standards of creditworthiness for the amount and terms of the credit requested.

Michigan Married Women's Property Act

The first section, effective February 13, 1855, provides:

> That the real and personal estate of every female, acquired before marriage, and all property, real and personal, to which she may afterwards become entitled by gift, grant, inheritance, devise, or in any other manner, shall be and remain the estate and property of such female, and shall not be liable for the debts, obligations and engagements of her husband and may be contracted, sold, transferred, mortgaged, conveyed, devised or bequeathed by her in the same manner and with the like effect as if she was unmarried. MCL 557.1, MSA 26.161.

Sections two and three, effective August 10, 1917, provide:

> Hereafter married women shall be possessed of the power and capacity, and it shall be competent for them to bind and make themselves jointly liable with their husbands upon any written instrument as hereinafter provided. *Said liability to extend, however, only to the property described in the following section.* MCL 557.52; MSA 26.182. (emphasis added)
>
> Hereafter the real estate of the husband and wife owned by them as tenants by entirety, or the real estate acquired by either as survivor of the other, or in the event of divorce the interest of either in real estate which was previously owned by them as tenants by the entirety, shall be liable to seizure and sale on execution, and all personal property and choses in action owned by husband and wife jointly with right of survivorship therein, shall be subject to writ of garnishment and all other process

provided by law, in satisfaction of any judgment which has been recovered against the persons who were at the time of the execution of such written instrument husband and wife jointly or the survivor upon any instrument signed by both. *In case the wife is the survivor, or in case the husband and wife have been divorced prior to the recovery of the judgment, a judgment against the wife may be satisfied only out of such property.* MCL 557.53, MSA 26.183. (Emphasis added).

No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

EULA MAE DENARD,
Petitioner and Plaintiff-Appellant,
v.
MICHIGAN NATIONAL BANK,
Respondent and Defendant-Appellee.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

CONCISE STATEMENT OF THE CASE

This petition for certiorari concerns an appeal from a summary judgment in respondent's favor, and its affirmance by the Court of Appeals. The nub of this petition is that the trial court's summary judgment improperly denied petitioner the right to a trial on her claim, and arbitrarily cut off critical discovery which she had undertaken to develop proofs in support of her claim. It is also contended that if the trial court's summary judgment were reversed, then the trial court should reconsider its earlier denial of petitioner's motion for class certification, after the completion of the necessary discovery.

Petitioner, a divorced woman, and professionally a registered nurse, holding a managerial position during the time in question at a health clinic, applied to respondent for a credit card. Respondent denied her application. Petitioner claims that in several aspects of respondent's evaluation of her application, respondent discriminated on the basis of her status as a formerly married woman, applying for a single *vis-a-vis* joint account in violation of the Equal Credit Opportunity Act, and Regulation B. Her appeal raises some important questions regarding the interpretation and application of this relatively new Act.[1]

---

[1] 1. In early 1970, petitioner's husband entered into a contract with Household Finance Co. for a loan to purchase a stove and refrigerator.

2. Household Finance in a practice now declared unlawful by Regulation B, 12 CFR § 202.7(d)(1) required petitioner to co-sign as a condition for her husband to receive the loan.

3. The scenario that follows is typical and well known in which married women have been routinely victimized. The loan was for the sole benefit of petitioner's husband. Later that same year in August, after her husband's purchase of the stove and refrigerator securing the loan, petitioner's husband moved from the marital home taking the appliances with him to a separate residence.

4. He subsequently defaulted on the loan. His employment was sporadic and the finance company did not have a record of his current address. The finance company filed an action against him but could not obtain service.

5. Petitioner, on the other hand, continued to reside at the marital home on which the finance company had a record.

6. The finance company filed another suit, this time against petitioner in the local municipal court. Petitioner was not served; nonetheless, a default judgment was entered against her on April 27, 1972, reflecting a chronic problem not uncommon in the small claims' courts in our large cities. See *National Commission on Consumer Credit in the United States*, XV, 141 (1972); Cardi, Vincent Paul, "The West Virginia Consumer Credit and Protection Act," 77 W. Vir. L. Rev. 401, 518 (1975).

7. Under the Michigan Married Women's Property Act, a married woman's separate estate is not liable for obligations jointly undertaken with her husband.

(cont'd.on following page)

The lower courts ignored the fact that a provision of respondent's own credit manual provided for the granting of petitioner's application, as well as ignored her contention that she had made an earnest effort to follow respondent's directions to resolve the matter without a lawsuit,[2] or her contention that even if she had given to respondent directly information uncontrovertibly demonstrating that the reported judgment was invalid, respondent would still have denied her application.[3]

It is no secret that there is a significant disparity between the sexes in their participation in the economic life of this country, and that historically women have been discriminated against in credit. Indeed, it was because of the perceived need to rectify discrimination against women in this area that Congress enacted the Act. Senate Report No. 93-278, pp 16-17 of the

(cont'd. from preceding page)

8. The finance company violated the Married Women's Property Act by instituting the action against petitioner, but did so with the apparent intention of exacting her cooperation in collecting from her husband.

9. A garnishment action against her employer alerted petitioner to what had occurred. She signed a partial payment agreement form which the court provided to halt the garnishment action.

10. She contacted the finance company. The finance company told her that they were not trying to collect from her, and would take no further collection action against her if she would simply provide her husband's current address. This she did. Although she has no personal knowledge, her husband evidently made some payments as noted in the local court file. She did not herself make any payments.

11. In July 1975, petitioner obtained a divorce from her husband. The judgment of divorce contained the standard property settlement clause which rendered everything she had in her possession her separate estate. Consequently, under the Married Women's Property Act, she was not liable on the judgment taken by the finance company irrespective of the actual disposition of the stove and refrigerator.

[2] Arabic numeral page references to Appendix filed with the United States Court of Appeals. Petitioner has requested the Clerk of the Court of Appeals to certify the Appendix to this Court. A 52-54, 634-639, 640, 641-643, 645-653, 655-666, 737-741, 824-825.

[3] A 52-54, 748-749, 828-829, 832-833, 835-836, 879-885.

Committee on Banking, Housing and Urban Affairs. Because these economic realities are no secret, it is transparent that the adoption of credit criteria, with arbitrarily set economic cut-offs, will adversely impact against women. The use of such criteria, if not properly validated, violate the Act.

The use of obviously disparately impactive criteria also inescapably compels the conclusion that the creditor must be aware of what it is doing, aware of the effect and consequences of its practices and procedures. The creditor must be aware that unless it can properly validate those criteria and procedures, their continued application must be taken as evidence of a discriminatory animus as well.

The concept and principles of validation in the context of testing and procedures used in the employment context are by now well-litigated and well-understood.[4] But validation as it applies to the credit context is both new and alien to the courts. In this case, petitioner had the experts to educate the trial court on validation in this context.

The lower courts also misconstrued the Equal Credit Opportunity Act's interrelationship with relevant state property laws. The record is beyond dispute that respondent disregarded a state property law, known as the Michigan Married Women's Property Act, that was highly relevant to evaluating petitioner's creditworthiness. Its disregard of this information in this context both violated the Act's legal test, and, provided further evidence of discriminatory animus toward applicants of petitioner's sex and marital status.

Petitioner recognizes that the denial of an individual woman's application for a credit card on purportedly,

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[4] See *James* v. *Stockham Valves and Fittings Co.*, 559 F.2d 310, 319 (5th Cir. 1977) *cert. den.* 434 U.S. 434; 98 S.Ct. 767; 54 L.Ed.2d 781 (1977).

superficially valid grounds may not seem of sufficient significance to warrant this court's attention. But to petitioner and the many women who find themselves similarly situated, it is important. Perhaps, it is true that many women now receive credit, and that many of the overt signs of discrimination of the past have disappeared. But it is respectfully submitted that many problems still exist that are subtler, and for that very reason, more pernicious and difficult to eradicate. For an interesting recent popularized discussion, see "Women Still Have Difficulty Getting Credit," Business Week, December 1, 1980. App H

ARGUMENT

I. THE APPELLATE COURT SANCTIONED THE TRIAL COURT'S DEPARTURE FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS SO AS TO CALL FOR AN EXERCISE OF THIS COURT'S POWER OF SUPERVISION.

A. The Trial Court Departed From The Accepted And Usual Course Of Judicial Proceedings By Granting Respondent's Motion For Summary Judgment In Lieu Of Conducting A Trial On Petitioner's Claim That The Respondent In Processing And Denying Her Application For A Credit Card Violated The Equal Credit Opportunity Act With Respect To Her Sex And Marital Status.

Petitioner's theory involves technical considerations in an area that is new to the courts — the propriety and validity of credit practices. To the extent that her theory is novel and involves complex considerations at this point in time, completely alien to the courts' conceptual framework, there is a particular need for her to be able to complete her discovery and to present her case at trial. *Shull* v. *Pilot Life Ins. Co.*, 313 F2d 445, 447 (5th Cir. 1963).

The appellate court clearly sanctioned the trial court's departure from the well-established principles concerning motions for summary judgment under F.R.C.P. 56.

The party moving for summary judgment has the burden of establishing the absence of any genuine issue of material fact. *Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144, 157, 90 S. Ct. 1598, 26 L.Ed.2d 142 (1970). This is so even when the party opposing the motion submits no evidentiary matter in opposition to the motion. 398 U.S. at 159-161, 90 S Ct. 1598, L.Ed.2d 155-156.

On summary judgment the inferences to be drawn from the underlying facts must be viewed in the light most favorable to the party opposing the motion. If a study of the record in this light reveals that inferences contrary to those drawn by the trial court might be permissible, there is a genuine issue as to ultimate facts material to the case, and it is improper for the district court to decide the case on motion for summary judgment. *United States* v. *Diebold, Inc.*, 369 U.S. 654, 655; 82 S.Ct. 993; 8 L.Ed.2d 176 (1962).

Summary procedures should be used sparingly in complex litigation where motive and intent play leading roles, the proof is largely in the hands of the defendant, and key witnesses are interested in the result of the suit. It is only when the witnesses are present and subject to cross-examination that their credibility and the weight to be given their testimony can be appraised. Trial by affidavit is no substitute for trial — which is the hallmark of 'even handed justice.' *Poller* v. *Columbia Broadcasting System, Inc.*, 368 U.S. 464, 473; 82 S.Ct. 486; 7 L.Ed.2d 458 (1962).

In reviewing the pretrial record, the papers supporting the movant are closely scrutinized, whereas the opponent's are indulgently treated. 6 Moore's Federal

Practice ¶ 56-15(3), pp. 2123-2126; *Bohn Aluminum Brass Corp.* v. *Storm King Corp.*, 303 F.2d 425, 427 (6th Cir. 1962).

1. In view of the fact that 1) respondent's own credit manual contraindicated respondent's avowed nondiscriminatory reason for denying petitioner's credit application on the basis of a four year old derogatory item appearing on petitioner's credit report, 2) respondent's credit analyst in deposition admitted that petitioner's credit application had been treated more strictly than provided by respondent's credit manual, and 3) the practices of other established creditors contraindicated respondent's avowed nondiscriminatory reason for denying petitioner's credit application, the respondent did not sustain its burden under F.R.C.P 56 of establishing that there was no genuine issue of fact as to whether any aspect of its treatment of petitioner's application discriminated against her on the basis of her sex or marital status.

If a creditor denies an application on the stated basis of a derogatory item on the applicant's credit report, the inquiry does not stop there. The reason is that if the creditor would not necessarily deny another application with a similar derogatory item on the applicant's credit report, there has been unequal treatment among the applicants. *McDonnell-Douglas Corp.* v. *Green*, 411 U.S. 792; 36 L.Ed.2d 668; 93 S.Ct. 1817 (1973); *Texas Department of Commonwealth Affairs* v. *Burdine*, 49 LW 4214 (1981). If that unequal treatment bears a relationship to the applicant's sex or marital status, then there has been discrimination in the credit transaction on the basis of the applicant's sex or marital status. If the aggrieved applicant claims such unequal treatment, and the creditor denies it, then there is a dispute which the trial court should allow the parties to have resolved through the normal process of discovery and trial. Because of the particular nature of credit transactions, the pertinent

evidence to resolve the dispute would almost always be in the exclusive control of the creditor.

Petitioner, as part of her discovery, took the depositions of respondent's assistant vice-president, principally responsible for devising respondent's credit manual, and the credit investigator, credit analyst, and the credit analyst's supervisor personally involved in the transaction with petitioner. In moving for summary judgment, respondent relied on selected excerpts from these depositions in contending that the only basis for denying petitioner's application was a four year old unsatisfied judgment reported against her on the TRW print-out to which respondent subscribed. The trial court relied on these excerpts, without the benefit of a trial to observe the demeanors of these deponents. In isolating these deposition excerpts from the total context of the transaction between the parties, the trial court entered summary judgment in respondent's favor.

The appellate court affirmed, stating:

> The undisputed facts are that the plaintiff had an outstanding judgment against her personally. Plaintiff argues, in effect, that the E.C.O.A. provides not only an opportunity for a defendant-debtor to collaterally attack a judgment of indebtedness, but that it also imposes an affirmative obligation on a defendant bank to explore any judgment against a woman to be certain that the judgment does not violate the M.W.P.A. We cannot accept such a broad, sweeping contention. At a minimum a bank does not violate the E.C.O.A. when it denies credit to an individual based upon a judgment of indebtedness against that person as the sole defendant. * * * It is apparent the plaintiff was denied credit for one reason, and one reason only — she had an outstanding judgment against her personally.

It is petitioner's contention that the lower courts unilaterally accepted respondent's version of events. Three important factors indicate that the trial court should have allowed the usual course of discovery and trial.

At the time of the application, the reported judgment was four years old, one year beyond respondent's manual's limitations period. After receiving respondent's rejection notice, petitioner spoke directly with respondent's credit analyst. She advised the credit analyst in lay terms of the above recited circumstances of the judgment. In addition, she wrote a letter to the credit analyst, stressing her excellent employment and listing six established creditors as references.[5]

The relevant provision of respondent's credit manual indicated a favorable decision on the application. App J.

This provision strikingly parallels 12 CFR § 202.5(j) of Regulation B then in effect, pp xx-xxi.

Second, respondent's credit analyst in deposition conceded that petitioner's application had been handled more strictly than as provided by the manual:

> Q. So in terms of exercising your own judgment, you were being stricter than what was suggested by this guideline, is that correct?
>
> A. That is correct. (A834)

Third, petitioner's own experience with other major creditors indicated disparate treatment of her application by respondent. Four major retailers opened charge accounts to petitioner with the same TRW or other comparable credit report entry of this judgment available to them.[6]

Petitioner, who had a checking account with respondent's co-subsidiary, Michigan National Bank

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[5] A 536. [6] A 16, 17-19, 20-21, 52-54, 204, 521, 692-695, 707-709.

of Detroit, similarly had received a mortgage to purchase a home and had received a loan from respondent's co-subsidiary Michigan National Bank of Oakland, notwithstanding the availability of this same TRW or other comparable credit report entry to them.[7]

Discrimination in this context means to treat an application less favorably. Reg. B, 12 CFR § 202.2(n). The pretrial record indicates that respondent treated petitioner's application less favorably than respondent's credit manual provided, and as provided by other established creditors, on a basis of an item intimately connected with petitioner's status as a formerly married woman.[8]

B. The Trial Court Departed From The Accepted And Usual Course Of Judicial Proceedings In Entering Summary Judgment Without Addressing Petitioner's Two Major Discovery Motions, Critical To Development Of Her Proofs, With Regard To Information Within The Respondent's Exclusive Control, That Had Been Pending For Four Months.

1. The trial court departed from the accepted and usual course of judicial proceedings in not allowing petitioner to complete her discovery commenced in consultation with her experts more than ten months prior to the court's entry of summary judgment in respondent's favor.

2. The trial court departed from the accepted and usual course of judicial proceedings in not enforcing its discovery order entered almost eight months prior to its entry of summary judgment in respondent's favor.

It is well-established that a trial court should not enter summary judgment without the opportunity for the party opposing the motion to make appropriate

[7] A 16, 17-19, 20-21, 52-54, 204, 707-709. [8] In reviewing the depositions, it may be noted that respondent's credit personnel were women. Do women, holding such positions, discriminate against members of their own sex? Petitioner was prepared to present expert testimony on the phenomenon at trial. A 571-572.

discovery of evidence within the exclusive control of the moving party.[9]

More than ten months before the trial court's entry of summary judgment, petitioner served interrogatories designed to develop through a multivariate analysis a comprehensive picture of respondent's treatment of credit applications.[10] Respondent declined to answer. As one of petitioner's experts pointed out, the failure of respondent to have the requested information at hand, itself, indicated a lack of appropriate self-monitoring. This failure to self-monitor, in turn, suggested disparate treatment. Affidavit of Diana Warshay, Ph.D. App K.

In the alternative to respondent, listing the requested information on all its applications, petitioner proposed that respondent draw a *random* sample from its files for the purpose of a pilot study to assess the necessary sample size for a statistically valid survey.

Almost eight months before its entry of summary judgment, the trial court ordered respondent to draw the random sample. App E

Respondent drew a sample, which further discovery revealed, was not random. Petitioner's experts by affidavit indicated to the trial court not only that the sample was not random, but also that there was no legitimate excuse for respondent not to have drawn a *random* sample, and that the data provided was not usable. Joint Affidavit of Diana Warshay, Ph.D., and Prof. James Hamilton.[11] Since the data was not usable, petitioner could not do the appropriate follow-up such as cross-checking the TRW reports.

Four months before the trial court's entry of summary judgment, petitioner moved for sanctions under

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[9] *Parrish* v. *Board of Comm'rs of the Alabama State Bar*, 533 F.2d 942 (5th Cir. 1976). [10] A 69. [11] A 274.

F.R.C.P. 37(b)(2) (A) and (D) regarding respondent's non-compliance with the trial court's order. The trial court entered summary judgment without addressing this motion.[12]

Respondent's noncompliance, coupled with its failure to have devised an appropriate self-monitoring system, strongly suggested a failure to validate its credit criteria. Petitioner more than six months prior to the trial court's entry of summary judgment served interrogatories designed to ferret out whether respondent had validated its criteria. See Regulation B, 12 CFR § 202.2 (p)(1) and (2).

Respondent had indicated that the individuals responsible for devising respondent's credit manual did not have training or experience in statistical analysis.[13] Respondent's failure to answer these interrogatories again strongly suggested lack of validation.

Four months before the trial court's judgment in respondent's favor, petitioner moved to compel answers pursuant to F.R.C.P. 37(a). The trial court again entered summary judgment without addressing this motion.[14]

C. The Trial Court Departed From The Accepted And Usual Course Of Judicial Proceedings By Ruling On The Class Certification Question Prematurely Before The Parties' Major Discovery Disputes Over Information Critical To The Question Had Been Resolved.

1. The trial court departed from the accepted and usual course of judicial proceedings by not addressing the class certification question in terms of the specific parameters of F.R.C.P. 23(a) and (b).

Given the nature of the case, at a relatively early stage in its litigation, the trial court issued an order requiring petitioner to file a motion for class certification within

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[12] A 265, 266, 274, 285, 286, 307, 313, 317, 1037.

[13] A 260, 262. *James* v. *Stockham Valves and Fittings Co., supra.*

[14] A 348, 356, 362, 379, 381, 399, 404, 406, 408, 409, 1037.

sixty days of the issuance of the order.[15] Unfortunately, the trial court issued the order without regard to the fact that discovery in the case was in the embryonic stage.

In presenting her motion for class certification, petitioner advised the trial court of her position that consideration of the class certification issue was premature in that the necessary discovery was incomplete.[16]

Nonetheless, the trial court proceeded to deny certification:

> It is clear, however, from the defendant's statement of fact that the plaintiff has a very unique individual claim, and is not a member of any of the classes that she seeks to represent. In response to the court's questions at oral argument as to how the plaintiff is a member of the classes she seeks to represent, the plaintiff's counsel could only state that the plaintiff was a woman who was denied credit, so that she was a member of the class of all women who were denied credit. The plaintiff has never even indicated, however, what the defendant's practices and procedures are that discriminate against either women or persons with spouses who have bad credit ratings. The plaintiff, therefore, has not carried her burden of showing that she is a member of the classes she seeks to represent; and we cannot certify those classes. (A258-259)

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[15] A 126. Petitioner's 23 day delay in filing the class certification motion was not a sufficient basis for denying certification, absent a showing of prejudice. *Gray* v. *Greyhound Lines, East*, 345 F.2d 169, 173 D.C. Cir. 1976) 173; *Muth* v. *Dechert, Price & Rhoads*, 70 F.R.D. 602, 606 (E.D. Pa. 1976); *Souza* v. *Scalone*, 64 F.R.D. 654, 656 (N.D. Cal. 1974); *Galinsky* v. *Columbia Univ.* 63 F.R.D. 178 (S.D. N.Y. 1974); *Sheridan* v. *Liquor Salesmen's Union*, 60 F.R.D. 48 (S.D. N.Y. 1973); *Feder* v. *Harrington*, 52 F.R.D. 178, 181-2 (S.D. N.Y. 1970); *Bentkowski* v. *Marfueuza Compania Maritima, S.A.*, 70 F.R.D. 401, 411 (E.D. Pa. 1976); *Strange* v. *Bd. of Ed.*, 70 F.R.D. 465, 466 (N.D. Miss. 1975); *Umbriac* v. *American Snacks, Inc.*, 388 F. Supp 265, 272 (E.D. Pa 1975).

[16] Brief in Support of Motion for Class Certification, A 130-131.

The trial court entered its memorandum and order denying certification, almost one whole month after its discovery order regarding petitioner's disparate treatment discovery. App D. The trial court's discovery order also found most of petitioner's answers to respondent's first set of interrogatories "detailed and responsive." (A115) With regard to respondent's interrogatories on the subject of respondent's alleged classwide discriminatory policies and procedures, the trial court acknowledged that they "could not be [fully answered] at the time they were propounded because plaintiff had not completed the necessary discovery." (A 115). Thus, the trial court, in essence, denied certification on the grounds that critical information was unavailable, which shortly before, it had ordered must be provided, and which it acknowledged was hitherto unavailable.

Petitioner's position on the class certification question is simply that if the trial court's summary judgment were reversed, the trial court should reconsider the class certification question after the parties' discovery disputes are resolved, and the necessary discovery is completed.[17]

In denying certification, the trial court also did not analyze the question in terms of the specific parameters of F.R.C.P. 13(a) and (b). Was the numerosity prerequisite of F.R.C.P. 23(a)(1) satisfied? Was the commonality prerequisite of F.R.C.P. 23(a)(2) satisfied? Was the typicality prerequisite of F.R.C.P. 23(a)(3) satisfied? Was the adequacy of representation prerequisite of F.R.C.P. 23(a)(4) satisfied? Was the proper vehicle F.R.C.P. 23(b)(2) or (b)(3), and if so, why?

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[17] *Rich* v. *Martin Marietta Corp.*, 522 F.2d 333, 341 (10th Cir. 1975); *Yaffe* v. *Powers*, 454 F.2d 1362, 1366 (1st Cir. 1972); *Dillon* v. *Bay City Constr. Co., Inc.*, 512 F.2d 801 (5th Cir. 1975); *Doctor* v. *Seaboard Coast Line R. Co.*, 540 F.2d 699, 707 (4th Cir. 1976).

Despite petitioner's severe handicap in presenting the class certification issue, petitioner's motion argued the question with particularized reference to F.R.C.P. 23(a) and (b). The trial court departed from the accepted and usual course of judicial proceedings by not making, literally, any reference to Rule 23.[18]

If the case is remanded for reconsideration of the class certification question, petitioner's position is that the trial court should address the question by specific and particularized reference to the sub-rules of F.R.C.P. 23.

II. THE FEDERAL APPELLATE COURT DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW — NAMELY, A FIRST IMPRESSION INTERPRETATION OF THE EQUAL CREDIT OPPORTUNITY ACT, WHICH HAS NOT BEEN, BUT SHOULD BE SETTLED BY THIS COURT.

A. The Use Of Credit Criteria, Which Are Not Properly Validated, And Which Have An Obvious Adverse Impact On The Basis Of A Credit Applicant's Sex And Marital Status, Are Probative In Determining Discriminatory Intent In The Evaluation Of The Aggrieved's Application.

1. The trial court should entertain expert testimony at trial to establish disparate impact, and how credit criteria are validated.

At trial, petitioner had hoped to educate both the trial court and respondent on how respondent could validate its criteria, but respondent declined to depose petitioner's experts in preparation for trial, and the trial court declined to conduct a trial.

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[18] See *Ballard* v. *Blue Shield of Southern West Virginia, Inc.*, 543 F.2d 1075, 1080 (4th Cir. 1976); *U.S.* v. *U.S. Steel Corp.*, 520 F.2d 1043, 1051 (5th Cir. 1975); *Price* v. *Lucky Stores, Inc.*, 501 F.2d 1177, 1179 (9th Cir. 1974); *Wilcox* v. *Commerce Bk.*, 474 F.2d 336, 345 (10th Cir. 1973); *Dolgow* v. *Anderson*, 438 F.2d 825 (2d Cir. 1970); *Barnett* v. *W.T. Grant Co.*, 518 F.2d 543, 546-8 (4th Cir. 1975); *Gibson* v. *Local 40*, 543 F.2d 1259, 1263n.2 (9th Cir. 1976); *Gray* v. *Greyhound Lines, East*, *supra*.

Petitioner's economist had prepared extensive tables as proposed trial exhibits derived from census bureau and labor department statistics to document the disparate impact of respondent's credit criteria against women and single *vis-a-vis* married joint applicants.[19] Unfortunately, the lack of opportunity to develop this proposed trial testimony leaves the record almost barren on the issue.

Griggs v. *Duke Power Co.* 401 U.S. 424; 28 L.Ed.2d 158; 91 S.Ct. 849 (1971) in now classic terms presented the disparate impact theory in the employment context. *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405; 45 L.Ed.2d 280; 95 S.Ct. 2362 (1975) in similarly now classic terms spoke to two basic propositions.

1) Good faith non-compliance is not a defense to restitution of those aggrieved. 2) Once the claimant presents a *prima facie* case of disparate impact, the burden of proof shints to the defendant to establish business necessity. If the defendant meets that burden, the claimant is afforded the opportunity to show viable alternatives.

Do the principles so eloquently enunciated in these cases apply to the Equal Credit Opportunity Act? The Congressional history explicitly says "Yes." App L.

The continued use of obviously disparately impactive criteria is probative of discriminatory intent. As the court stated in *Arlington Heights* v. *Metropolitan Housing Corp.*, 429 U.S. 252, 266; 50 L.Ed.2d 450 97 S.Ct. 555 (1977).

4gDetermining whether invidious discriminatory purpose was a motivating factor demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available.

In *Dayton Bd. of Ed.* v. *Brinkman*, 443 U.S. 526; 99 S.Ct. 2971; 61 L.Ed.2d 720 (1979) and *Columbus Bd. of Ed.* v.

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[19] A 489, 606, 274, 569, 575.

Penick, 443 U.S. 499; 99 S.Ct. 2941; 61 L.Ed.2d 666 (1979), the court made it clear that proof of foreseeable consequences is one type of quite relevant evidence of discriminatory purpose. Further the court allowed the finder of fact to draw an inference of discriminatory animus from acts which are foreseeably discriminatory.

B. Proof Of Disparate Treatment Of Applicants Of The Same Sex Or Marital Status As The Aggrieved Applicant Is Probative Of Discrimination Against The Individual Applicant.

1. The trial court should entertain expert testimony at trial as to how a properly conducted survey of a creditor's treatment of credit applications may show discrimination on the basis of the individual's sex or marital status.

It is by now well-established that evidence of discrimination against an individual's class is probative of discrimination against the individual.[20] Nor can trial of the petitioner's individual claim be robbed of the setting necessary to give credibility to her personal claim of discrimination.[21]

C. The Legal Test Of The Equal Credit Opportunity Act Is Not A Bottom Line Test.

There are two "Title VII's." Title VII of the Civil Rights Act of 1964, popularly known as the Equal Employment Opportunity Act, and Title VII, of the Consumer Credit Protection Act, popularly known as the Equal Employment Opportunity Act. The E.C.O.A. reflects the influence of both the E.E.O.A. and Title I of the Consumer Credit Protection Act, popularly known as the Truth in Lending Act.

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[20] *McDonnell-Douglas Corp.* v. *Green, supra; Laugesen* v. *Anaconda Co.*, 510 F.2d 307, 317 (6th Cir. 1975); *Marquez* v. *Omaha District Sales Office, Ford Division*, 440 F2d 1157, 1160 (8th Cir. 1971); *Burns* v. *Thiokol Chemical Corp.*, 438 F2d 300, 305-307 (5th Cir. 1973).

[21] *Donaldson* v. *Pillsbury Co.*, F.2d 825, 833 (8th Cir. 1977) *cert. den.* 434 L.Ed.2d (1978).

The legal test of E.C.O.A. is underscored, however, by critical differences between the relief affordable under E.C.O.A. and E.E.O.A. The original version of the E.C.O.A. was adopted at the same time as the 1973 amendments to the civil liability provisions of the T.I.L.A., and specifically incorporated those amendments into its civil remedy provision. Senate Report 93-278, p. 18. On the matter of relief, the E.C.O.A. reflects the strong influence of the T.I.L.A.

Damages under E.E.O.A. are limited to back pay.[22] In contrast, the liability of "any creditor who fails to comply with *any* requirement imposed under" E.C.O.A. extends to "*any* actual damages sustained by [the] applicant acting either in an individual capacity or *as a member of a class*." 15 USC § 1691e(a) (Emphasis added).[23]

E.E.O.A. does not allow for award of punitive damages.[24] In contrast, "*any* creditor . . . who fails to comply with *any* requirement imposed under" E.C.O.A. "*shall* be liable to the aggrieved applicant for punitive damages" up to $10,000, "in addition to any actual damages," "except that in the case of a class action the total recovery shall not exceed the lesser of $500,000 or 1 per centum of the net worth of the creditor." 15 USC 1691e(b). (Emphasis added). In determining the amount of punitive damages, the court "*shall* consider, among relevant *factors*," not only any actual damages awarded, or the extent to which the creditor's failure of compliance is intentional, but "the frequency and persistence of failure of compliance," "the resources of the creditor," and "the number of persons adversely affected." 15 USC 1691e(b).

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[22] *Harrington* v. *Vandalia-Bulter Bd. of Ed.*, 585 F.2d 192 (6th Cir. (1978). [23] *Shuman* v. *Standard Oil Co. of Calif.*, 453 F. Supp 1150 (N.D. Cal. 1978) (damages for mental distress). [24] *E.E.O.C.* v. *Detroit Edison Co.*, 515 F.2d 301 (6th Cir. 1975), *vacated on other grds*, 431 U.S. 951; 97 S.Ct. 2669; 53 L.Ed.2d 267 (1977).

E.C.O.A.'s mandate of punitive damages is clearly drawn from T.I.L.A. 15 USC 1640(a) (2) (A) and (B). The punitive damages provision is important as an incentive for the aggrieved credit applicant to litigate because of the obvious practical difficulty in many instances of clearly establishing actual damages. Congress in originally passing T.I.L.A. recognized the necessity of punitive damages for this very reason. 1968 U.S. Code Cong. and Adm. News, p. 1962.

Most importantly, "upon application by an aggrieved applicant, the . . . court . . . may grant such equitable and declaratory relief as is necessary to enforce the requirements imposed under" the Act. 15 USC 1691e(c).

Thus, in *Smith* v. *Lakeside Foods*, 449 F. Supp. 171 (N.D. Ill. 1978), the plaintiff alleged that the forms for a credit application in a grocery store were in violation of the E.C.O.A. The defendant admitted its forms were not in compliance with the Act, but alleged that the plaintiff was not damaged by this fact in any way. The court stated that even if no actual damages were proven, the plaintiff could still be entitled to declaratory or injunctive relief, or punitive damages, as well as reasonable attorney's fees and cost.[25]

The literal language of the E.C.O.A., proscribing discrimination on the basis of sex or marital status in any aspect of a credit transaction has far-reaching implications. It's literal application is fully consistent with the Act's remedial purpose and principles of liberal statutory construction; nonetheless, in the still embryonic stage of the Act's judicial construction, there has been some resistance to the language's full effectuation in particular contexts.[26]

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[25] See *Carroll* v. *Exxon Co.*, 434 F.Supp. 557 (E.D. La. 1977).

[26] *Harbaugh* v. *Continental Ill Nat. Bank*, 615 F.2d 1169 (7th Cir. 1980); *Haynes* v. *Bank of Wedowee*, CCH Consumer Credit Guide ¶ 97, 256 (5th Cir. 1981).

On the other hand, the court's decision in *Markham* v. *Colonial Mortg. Serv. Co. Associates*, 605 F.2d 566 (D. Col. 1979) provides a very fine illustration on the application of the Act's test. Petitioner agrees wholeheartedly with the *Markham* Court that the starting point must be "the language of the statute itself" and that "the meaning of the words chosen by Congress is readily apparent." at F.2d 569-570.

To understand the "any aspect of a credit transaction" test, it is important to understand what the test does *not* require. It is certainly not a sole reason or sole factor test.[27] Nor does the test necessarily depend on the validity of the ultimate action taken by a creditor in granting or denying an application.[28] A creditor in other words, may grant an application, or deny an application on legitimate grounds, and, yet, in the process of evaluating that application discriminate on the basis of marital status or sex in some aspect of the total transaction. See Regulation B, 12 CFR § 202.2(m).

Unlike some interpretations of the E.E.O.A., the test of E.C.O.A. by its very language is *not* a bottom-line test. What is a bottom-line test? In the employment context, input and output are examined. If based on that input, the output is valid, then there is arguably no violation even though there is discrimination in some aspect of the processing of that input. In other words, if at the *bottom line*, the decision of the employer is justified, then there is no violation even though there is discrimination in some aspect of the employer's reaching that decision. A case in point is the paradigm developed in the employment discrimination context regarding the disparate treatment theory. This paradigm is essentially a model for inferring *intentional* discrimination where no

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[27] *King* v. *Laborers, Local 818*, 443 F.2d 273 (6th Cir. 1971); *Laugesen* v. *Anaconda Co., supra.* [28] *Boyd* v. *Ozark Airlines, Inc.* 568 F.2d 50 (8th Cir. 1977); *Gillan* v. *Federal Paper Board Co.*, 479 F.2d 102 (2d Cir. 1973).

direct evidence of intent exists. However, if there is a valid nondiscriminatory reason for the employer's decision, no intent will be inferred. Under the disparate impact theory, of course, the inquiry is not for intent but for *effect*. Under the bottom-line test in its purest form, however, even if there is a disparate impact in some aspect of the employer's selection procedure, there will be no violation if the decision made about the employee is at the bottom-line jusitifed.

In contrast to the bottom-line test, the language of section 1691(a) of E.C.O.A. read in conjunction with its comprehensive civil remedy provisions is undoubtedly the most prophylactic legislative enactment ever passed by Congress for cleansing and purifying all aspects of the operations of the industry which it is designed to regulate, the consumer credit industry. By its terms, any individual is aggrieved when there has been some aspect of the credit transaction that is discriminatory. Thus, even if at the bottom line, an adverse action taken on an individual credit application is justified, if some aspect of the transaction is discriminatory, the applicant is vested with the power to take appropriate action to cleanse the transaction and to deter the creditor from failing to make the necessary adjustment for other applicants. By the same token, even if the action taken by the creditor on the individual applicant is favorable, the applicant is, nonetheless, empowered to take action to cleanse that aspect of the transaction that is discriminatory. The benefit of the individual applicant's action is not intended just for the benefit of him or her alone, but rather for all of those who have been or may be similarly subject to the same discriminatory aspect of the creditor's operation.

At first blush, the implication of the Act's language may seem radical; yet it derives directly from the explicit Congressional intent. App. M

D. The Creditor's Disregard Of Information Relevant To Determining An Applicant's Creditworthiness And Intimately Linked To The Applicant's Sex And Marital Status Violates The Equal Credit Opportunity Act's Legal Test, Prohibiting Sex Or Marital Status Discrimination In Any Aspect Of A Credit Transaction.

1. A creditor's disregard of a state property law such as the Michigan Married Women's Property Act, which is relevant to evaluating an applicant's creditworthiness, and intimately linked to the applicant's sex and marital status, violates the Equal Credit Opportunity Act's legal test, prohibiting discrimination on the basis of sex or marital status in any aspect of a credit transaction.

2. The Act invests in the aggrieved applicant standing to seek declaratory and injunctive relief to require the creditor to consider such information in evaluating creditworthiness.

Credit evalualuation is an inherently discriminatory process. The private creditor is not engaged in a philanthropic enterprise. It is engaged in a business which has as its goal the earning of profit. In extending credit, the private creditor must discriminate between those applicants who are creditworthy, and those applicants who are not creditworthy. The Act encourages the creditor to make informed business decisions, by requiring that the creditor not discriminate on the basis of sex or marital status. It is not to the creditor's advantage to reject creditworthy applicants because of ignorance or caprice. Congress clearly recognized this. App. N

Congress recognized in passing the Act that state property laws may be highly relevant to determining creditworthiness. The Act, in fact, contemplates that creditors will take state property laws into consideration in evaluating creditworthiness. 15 USC § 1691d(b) and (f)

Both good business sense and the requirement of nondiscrimination, require that the creditor consider all information relevant to evaluating an applicant's creditworthiness. See Regulation B, 12 C.F.R. § 202.6(b)(6)(ii). If the creditor disregards relevant information intimately connected with the applicant's sex or marital status, which provides for more favorable treatment, there is then in that aspect of the credit transaction discrimination on the basis of the applicant's sex or marital status. Specifically, if a state property law intertwined with the applicant's sex or marital status and pertinent to the favorable evaluation of the applicant's creditworthiness is disregarded, then there is in that aspect of the creditor's evaluation process, discrimination with respect to the applicant's sex or marital status.

No creditworthy applicant should be denied credit because the creditor has arbitrarily disregarded relevant information linked to that applicant's sex or marital status. By disregarding that information, the creditor is treating that applicant less favorably than other applicants for whom all relevant information is considered. Regulation B, 12 C.F.R. § 202.2 (n).

> If it is an impermissible discrimination to draw a distinction where no relevant difference exists, it must be discriminatory as well to refuse to draw a distinction where the circumstances manifestly justify one.[29]

The Michigan Married Women's Property Act is the label for a series of three statutes enacted in 1855, 1911, and 1917. In eliminating the disabilities of converture, the Act conferred on married women an unique

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[29] *Collins* v. *White*, (N.D. Ohio 69-930, 1971) Not received by West Publishing Co. for publication. Published in "Materials on Welfare Law," Center on Social Welfare Policy and Law, Vol. II, Ch. VI, p 137, 139.

protection against the predations of their husbands. *National Bank of Rochester* v. *Meadowbrook Heights, Inc.*, 80 Mich App 777; 265 NW2d 43 (1978).

By its explicit provisions, the M.W.P.A., MCLA 557.1, MSA 26.161; MCLA 557.52, MSA 26.182; MCLA 557.53, MSA 26.183 prohibits execution on property separately owned by a woman on judgments entered against her based on obligations undertaken jointly with her husband or former husband.

Petitioner's standard divorce rendered *all* property previously jointly owned by her and her former husband and retained by them, respectively, the separate estate of each. App. O. See *Charlton* v. *Charlton*, 397 Mich. 84, 243 N.W.2d 261 (1976). As a consequence, petitioner, at the time of her application to the respondent ten months later was simply not liable on the judgment entered against her under any circumstances whatsoever, irrespective of which property, which party had retained. Consequently her failure to satisfy the judgment was not indicative of her ability and willingness to repay obligations undertaken entirely in her own account.

The Federal Reserve Board has confirmed that application of the M.W.P.A. in evaluating creditworthiness is squarely within the E.C.O.A.'s contemplation, in a letter by Equal Credit Opportunity Section Chief Anne Geary. App. F [30]

The underlying rationale of the M.W.P.A. is similar to that of a Florida statute which provided a property tax exemption for widows, not extended to widowers. The court speaking through Justice Douglas, in *Kahn* v.

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[30] This interpretation is entitled to judicial deference, *Ford Motor Credit Co.* v. *Milhollin*, — U.S. —; 100 S.Ct. 790; 63 L.Ed.2d 22 (1980). The Michigan Attorney General has independently come to the same conclusion. OAG, 1975-1976, No. 5037; OAG, 1977-1978, No. 236. App G.

Shevin, 416 U.S. 351, 353-355, 40 L.Ed.2d 189; 945 S.Ct. 1734 (1974) upheld the Act as rationally related to the substantial economic disadvantage of women in our society.

City Finance Co. v. *Kloostra*, 47 Mich App 276; 209 N.W.2d 498 (1973) provides a definitive review of the history and purpose of the M.W.P.A. Its review of the Constitutional history of the Michigan Constitution of 1963 leads to the same conclusion. App. P.

Unfortunately, respondent's credit personnel could not properly evaluate petitioner's application, not simply because they did not understand the M.W.P.A. but because they had not even heard of it.[31]

Unfortunately, the lower courts' treatment of the subject is similarly lacking in understanding. Petitioner's contention is not that the creditor should investigate or collaterally attack every judgment that may appear on a TRW printout, but simply that the creditor has a duty to train its personnel on sex-linked or marital status-linked state property laws directly or indirectly affecting creditworthiness so that they may make informed decisions in discriminating between the creditworthy applicant and those whose applications should justifiably be denied. Petitioner clearly has standing to seek appropriate declaratory and injunctive relief in his regard.

E. If A Married Or Formerly Married Woman Applicant 1) Satisfies All The Creditor's Criteria, And 2) Provides A Satisfactory Explanation That A Derogatory Item Is Attributable To Her Husband Or Former Husband Which Is Not Predictive of Her Creditworthiness, A Creditor Should Extend Credit, In The Absence Of Showing An Unacceptable Risk Factor.

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[31] A744, l.12-745, l.22; A111, l.5-12, l.11; A869, l.11-870, l.12; A855, l.4-17; A887, l.4-888, l.1

Were petitioner's representations regarding the judgment to respondent's credit analyst, at the time of her application, credible?

According to the credit analyst's deposition testimony they were; yet, the analyst again admitted treating petitioner's explanation less favorably than respondent's credit manual provided.[32]

The credit analyst had very good reason to find petitioner's representations credible. Not only did petitioner have an excellent employment history and credit references that were readily verifiable pursuant to respondent's usual course of conduct, but respondent's credit investigator contacted the loan company holding this "very old judgment," and found that the latter had no record of it![33]

If a formerly married woman gives a credible explanation to the effect that a derogatory item is attributable to her former husband, which is not predictive of her ability and willingness to repay obligations undertaken in her own account, what is the entirely avoidable *effect* of the creditor's refusal to extend credit? In this context, not only is the creditor's practice attitudinally suspect, but so is its basic business sense.

To evaluate sound creditor practice in this regard, it would be necessary for the trial court to explore what constitutes sound practice by a full development of all relevant facts and opinions as to what other creditors do in a similar situation, with the aid of expert testimony as to whether the practice provides for properly derived determinants of creditor profitability. In essence, the creditor must be able to show an unacceptable risk factor to justify the discriminatory effect of its practice.[34]

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[32] A828, l.24-829, l.16; A832, l.8-833, l.10; A834, l.16-837, l.1

[33] A827; A854, l.18-A858, l.5; A860, l.20-A861, l.4

[34] *Robinson* v. *P. Lorillard Co*, 444 F.2d 791 (4th Cir. 1971), cert. dis. 404 U.S. 1006, 1007 (1971).

F. An Individual Credit Applicant Whose Application Has Been Pre-Screened On The Basis Of Credit Criteria That Adversely Impact On The Basis Of Her Sex And Marital Status Has Standing To Seek Appropriate Declaratory And Injunctive Relief Requiring The Creditor To Validate Its Criteria.

Petitioner's application satisfied respondent's pre-screening criteria that adversely impact on the basis of her sex and marital status. Because her application was screened under unvalidated disparately impactive criteria, that aspect of her transaction with respondent was discriminatory in a prohibited manner; but, the lower courts rejected her argument that she had standing to seek declaratory or injunctive relief requiring respondent to validate these criteria.

In *Gladstone, Realtors* v. *Village of Ballwood*, 441 U.S. 91; 99 S.Ct. 1601; 60 L.Ed.2d 66 (1979), the court made it clear that the "prudential limitations" test for standing does not apply to Congressional legislation such as this Act. *Cherry* v. *Amoco Oil Co.*, 481 F. Supp 727 (N.D. Ga. 1979). The question then is whether petitioner suffered a "distinct and palpable injury" to herself to satisfy the Article III "minima" of the Constitution. If these pre-screening criteria are arbitrarily viewed in isolation from the total context of petitioner's transaction with respondent, petitioner in a narrow sense arguably suffered no injury. On the other hand, if these criteria are viewed in the total context of respondent's discriminatory treatment and rejection of her application, she suffered sufficient injury to take corrective action with respect to all aspects of that transaction. It is respectfully submitted that when the court has rejected a broad view of standing in the context of a broad remedial statute, it has been, essentially, when there has been no established *transaction* between the individual parties.

G. The Congressional History Of The Equal Credit Opportunity Act Demonstrates A Congressional Policy To Encourage Class Action Enforcement.

1. The trial court erred in deciding the class certification question without addressing the Congressional policy to encourage class action enforcement of the Act.

Not only does the above Congressional history clearly show a Congressional view of discrimination on the basis of sex or marital status being class discrimination, but the Congressional history is explicit and emphatic on class action enforcement of the Act. App. Q.

While class certification may be reposed in the trial courts' sound discretion, the trial court in exercising that discretion must address the Congressional policy.[35]

Petitioner's position is simply that if the case were remanded for reconsideration of the class certification question, the trial court should address this Congressional policy.

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[35] *Wirtz* v. *B.B. Saxon Co.* 365 F.2d 457 (5th Cir. 1966); *Shultz* v. *Parke*, 413 F.2d 1364 (5th Cir. 1969); *Head* v. *Timken Roller Bearing Co.*, 486 F.2d 970, 876-77 (6th Cir. 1973); *Watkins* v. *Simmons & Clark, Inc.* 618 F.2d 398, 402 (6th Cir. 1980).

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

EULA MAE DENARD,
Petitioner and Plaintiff-Appellant,
v.
MICHIGAN NATIONAL BANK,
Respondent and Defendant-Appellee.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT (Appendix)

ORDER

(United States Court of Appeals
For the Sixth Circuit)

(Filed November 12, 1980)

Eula Mae Denard, Plaintiff-Appellant v. Michigan National Bank, Defendant-Appellee. No. 79-1184

Before: Engel, Keith and Merritt, Circuit Judges.

Plaintiff appeals from the grant of a summary judgment in favor of defendant and the denial of class

action certification. This action, brought under the Equal Credit Opportunity Act (E.C.O.A.), 15 U.S.C. § § 1691 *et seq.*, alleges that the defendant discriminates against women and single persons in its credit practices. Defendant (Bank) has moved for either dismissal of this appeal or summary affirmance of grounds that plaintiff has repeatedly disregarded the trial and appellate court time limits.

Plaintiff, a registered nurse living in Detroit, was divorced in 1975. In April, 1976, she applied for a Michigan Bankcard. Her application was screened and eventually denied because her credit report indicated a 4-year-old judgment against her for $500. Plaintiff was named as sole defendant in the uncollected judgment, and had also made partial payments on that judgment.

The Bank notified plaintiff that her application had been denied because of the credit report. She contacted the defendant and stated that she was not liable on the indebtedness because of the Michigan Married Woman's Property Act (M.W.P.A.), and that she had good credit references. The defendant told plaintiff that she would have to verify that the judgment was in fact not against her before a credit card would be issued. Plaintiff did not do this, but instead instituted this suit.

The undisputed facts are that the plaintiff had an outstanding judgment against her personally. Plaintiff argues, in effect, that the E.C.O.A. provides not only an opportunity for a defendant-debtor to collaterally attack a judgment of indebtedness, but that it also imposes an affirmative obligation on a defendant bank to explore any judgment against a woman to be certain that the judgment does not violate the M.W.P.A. We cannot accept such a broad, sweeping contention. At a minimum a bank does not violate the E.C.O.A. when it

denies credit to an individual based upon a judgment of indebtedness against that person as the sole defendant. At least in this circumstance the bank is not required to affirmatively investigate such a facially valid judgment.

Plaintiff further urges, however, that if defendant discriminates as to "any aspect" of its credit application it is liable under the E.C.O.A. In effect, the bank would be strictly liable to plaintiff for violating the E.C.O.A. even though the violation was not the reason for denying her credit. Nothing in the language of the E.C.O.A., however, eliminates the requirement of a causal relationship between the discrimination and the effect. Even assuming that the bank violated the E.C.O.A. in some aspects of its credit process, those violations did not affect plaintiff. As noted above, in plaintiff's case the E.C.O.A. does not require an independent investigation by the bank. It is apparent the plaintiff was denied credit for one reason, and one reason only — she had an outstanding judgment against her personally.

We admonish plaintiff's attorney for his frequent disregard of court filing dates. Particularly in light of the frequent late filing by plaintiff, we cannot say that the District Court erred in denying class action certification.

This case is decided on the merits without consideration of defendant's motion to dismiss.

Accordingly, the judgment of the District Court is hereby affirmed.

ENTERED BY ORDER OF THE COURT

/s/ John P. Hehman, Clerk

ISSUED AS MANDATE: FEBRUARY 23, 1981
COSTS: NONE

ORDER DENYING PETITION FOR REHEARING

(United States Court of Appeals
For the Sixth Circuit)

(Filed Feb. 16, 1981)

Eula Mae Denard, Plaintiff-Appellant v. Michigan National Bank, Defendant-Appellee. No. 79-1184

Before: ENGLE, KEITH and MERRITT, Circuit Judges.

Upon consideration of the petition for rehearing filed herein by the plaintiff-appellant, the court concludes that the petition for rehearing shall be denied due to the untimely filing of the petition in accordance with Rule 40 of the Federal Rules of Appellate Procedure.

Further, the order in the above-entitled action filed on November 12, 1980, is amended to delete the phrase "and also made partial payments on the judgment," page 1, second paragraph, last sentence. The sentence should read "Plaintiff was named as sole defendant in the uncollected judgment."

Accordingly, it is so ORDERED.

ENTERED BY ORDER OF THE COURT

/s/ John P. Hehman
Clerk

MEMORANDUM OPINION

(United States District Court
Eastern District of Michigan
Southern Division)

Eula Mae Denard, Plaintiff, v. Michigan National Bank, Defendant. Civil No. 7-71351.

The plaintiff filed this action "for violations of Title VII of the Consumer Credit Protection Act, popularly known as the Equal Credit Opportunity Act . . ., 15 U.S.C. § 1691, *et seq.* . . . in connection with defendant's policies and procedures in extending credit under the Michigan BankAmericard Program." Complaint ¶ I-1. The plaintiff alleges that on April 21, 1976, she applied to defendant for a BankAmericard account and that defendant refused to extend plaintiff credit "under such account on the basis of policies and procedures which operated and continued to operate to discriminate against plaintiff on the basis of her sex and marital status . . . ." We denied defendant's motion for a more definite statement but allowed defendant to propound ten interrogatories to the plaintiff "to obtain a better statement of plaintiff's claim." Order December 29, 1977. The class allegations in plaintiff's complaint also lack specificity and did not indicate "what the defendant's practices and procedures [were] that discriminate against either women or persons with spouses who have bad credit ratings." Accordingly, we denied plaintiff's motion for class certification. Memorandum and Order, June 13, 1978.[1]

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[1] An additional reason for denying certification was plaintiff's failure to allege facts which indicated that she was a member of the class she sought to represent.

Relying upon facts developed through interrogatories and depositions of relevant witnesses, the defendant has now filed a motion for summary judgment. The defendant contends that there is no dispute as to any material fact and that the facts do not show any prohibitive discrimination against the plaintiff. The plaintiff does not appear to dispute the fact that summary judgment is appropriate in this case, contending that if her legal position is accepted she would be entitled to summary judgment on the question of liability. Plaintiff's brief at 42. When pressed at oral argument to tell the court what disputed facts remained for trial, plaintiff's counsel indicated that facts as to the defendant's general, allegedly discriminatory practices remained in dispute. Plaintiff argued that she had a right to go to trial to establish that defendant generally discriminates against women and against divorced individuals.

The plaintiff's amended complaint is as vague as her initial complaint. Basically, she alleges that defendant refused to extend credit on the basis of policies and procedures that discriminate against women and divorced individuals and that defendant failed to inform her of her rights and administrative remedies under the Consumer Credit Protection Act. Plaintiff relies upon 15 U.S.C. § 1691(a) (1976) which provides that:

> It shall be unlawful for any creditor to discriminate against any applicant, with respect to any aspect of a credit transaction —
>
> (1) On the basis of race, color, religion, national origin, sex or marital status, or age . . . .

The facts developed through discovery establish that on April 21, 1976, plaintiff obtained a Michigan

BankAmericard application at one of the defendant's branches.[2] The date stamp on this application indicates that it was received by Michigan BankAmericard on May 4, 1976. *See* Exhibit 1 attached to defendant's brief. Ms. Dilldine, defendant's employee, requested a credit report on plaintiff from TRW, Inc., a credit reporting company. The credit report forwarded to Ms. Dilldine reflected an unpaid judgment against plaintiff obtained by Household Finance Corporation. *See* Exhibit 2, attached to defendant's brief; plaintiff's brief in opposition to motion for summary judgment at 1. On May 6, 1976, the defendant forwarded to plaintiff a form notification advising that "we are unable to grant your request for a Michigan BankAmericard" because of information contained in a consumer report from TRW, Inc. The form listed the full name and address of TRW, Inc., and also advised the plaintiff of other provisions of the Federal Equal Credit Opportunity Act. Exhibit 3 attached to defendant's brief. The plaintiff then sent the defendant a letter, in which she explained that the uncollected judgment, which TRW had reported, was against her husband and not her. Exhibit 4 attached to defendant's brief. There were also a series of telephone calls between the plaintiff and Ms. Dilldine. In one of those calls, Ms. Dilldine advised the plaintiff that she would need some verification from TRW, Inc. that the judgment was indeed against her husband and not her. Ms. Dilldine then wrote on the defendant's copy of the rejection notice that the customer was going to have TRW, Inc., contact the defendant. Exhibit 3 attached to defendant's brief. The plaintiff called TRW, Inc. and was told that

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[2] As required by ¶ 10 of this court's pretrial order, the defendant filed as exhibits all the documents relevant to plaintiff's application for credit.

Household Finance Corporation, who reported the adverse judgment to TRW, Inc., would have to remove it. *See* Denard deposition at 14. The plaintiff then called Ms. Dilldine, but was told that she had to obtain a "rider" before she could receive credit. *Id.* at 16. The plaintiff did nothing further.

The above facts are uncontroverted. The plaintiff contends that the defendant had a duty to further investigate the plaintiff's adverse credit report, but does not contend that any failure to investigate further was a result of discriminatory motives. *See* plaintiff's brief at 2. The plaintiff also contends that she can show the defendant generally discriminates against women and divorced individuals. Finally, the plaintiff heavily relies upon the defendant's failure to take into account the Michigan Married Women's Property Act, arguing that the plaintiff was indeed not liable on the reported judgment.

If everything the plaintiff contends in her response to defendant's motion for summary judgment is accepted as true, the defendant is still entitled to judgment. The plaintiff simply has not alleged or presented facts that would indicate any discriminatory conduct in the handling of plaintiff's transaction. Even if the plaintiff can show some general discrimination on the part of the defendant, that does not establish that defendant's refusal to extend this plaintiff credit was discriminatorily motivated. The exhibits and plaintiff's own deposition clearly indicate that credit was denied on the basis of an adverse credit report of an unpaid judgment against the plaintiff personally. The mere establishment of general discrimination is not sufficient to counter those facts. Additionally, defendant does not have an affirmative duty to investigate the circumstances of the reported

judgment, so long as the failure to investigate was not based upon discriminatory motives. There is absolutely nothing in this record that would even suggest that the defendant's failure to investigate further was the result of any discriminatory intent or was applied to discriminate. Finally, plaintiff's contentions about the Michigan Married Women's Property Act are irrelevant because the defendant did not know that the judgment was against plaintiff's husband. The plaintiff admits that the reason she was denied credit was because of the report of an adverse judgment against *her*. Moreover, we think it was reasonable for the defendant to require that the plaintiff produce some proof that the uncollected judgment was not against her, in addition to her mere assertion that it was not. Nothing in this record even suggests discrimination in this denial of credit. Therefore, the defendant's motion for summary judgment will be granted.

IT IS SO ORDERED.

/s/ Robert E. DeMascio
United States District Judge

Dated: January 10, 1979

MEMORANDUM AND ORDER

(United States District Court
Eastern District of Michigan
Southern Division)

Eula Mae Denard, individually and on behalf of others similarly situated, Plaintiff, vs. Michigan National Corporation, et al, Defendants. Civil No. 7-71351

The plaintiff filed a motion to certify this cause as a class action, contending that she is qualified to represent

three distinct classes of individuals who have been denied credit by the defendant. The plaintiff defines those classes as: (1) all who have applied for credit with the defendant who have not been given a notice of their rights under the Consumer Credit Protection Act; (2) all women who have been discriminatorily denied credit by the defendant; and (3) all individuals who have been refused credit on the basis of information about a spouse or former spouse. The plaintiff contends that the four requirements of Fed. R. Civ. P. 23(a) are "more than likely satisfied." The defendant opposes plaintiff's motion arguing that the plaintiff is not a member of any of the classes she seeks to represent, that this action would be totally unmanageable as a class action, that the claims of the named plaintiff are not typical of the class, that the plaintiff would not adequately represent the class, and that the motion to certify is untimely. We agree with the defendant and decline to certify this action as a class action.

The plaintiff filed her complaint on June 2, 1977, at which time she indicated that she was seeking to bring a class action. On January 10, 1978, after this action had been pending for seven months, the court entered an order giving plaintiff an additional 60 days to move to certify the classes she was seeking to represent. The plaintiff did not file her motion to certify until April 3, 1978, 83 days after our January 10th order. The plaintiff has not given any legitimate reason for failing to move within the time limits set by the court or to file a motion for an extension of time. We believe that the plaintiff's attorney's failure to comply with the time requirements indicates that he might well not be able to fairly and adequately protect the interests of the proposed class in this complex and extended litigation. *See Walker v. Columbia University*, 62 F.R.D. 63, 64 (S.D.N.Y. 1973).

Consequently, we will not cerfity the class, since the plaintiff's motion was not timely. *See Walton v. Eaton Corp.*, 563 F.2d 66, 74-75 (3d Cr. 1977); *Coffin v. Secretary of Health, Education and Welfare*, 400 F. Supp. 953, 956-57 (D.D.C. 1975) *appeal dismissed* 430 U.S. 924.

In any event, we do not choose to base our holding on plaintiff's untimeliness because we conclude that plaintiff's motion to certify must be denied on the merits. The plaintiff bears the burden of establishing that the requirement of Fed. R. Civ. P. 23(a) are met before an action can be certified as a class action. *Senter v. General Motors Corp.*, 532 F.2d 511, 522 (6th Cir. 1976) *cert. denied*, 429 U.S. 870. This plaintiff has not, however, even established that she is a member of the class she seeks to represent.

In its response to the instant motion, the defendant has presented an extensive statement of facts, essentially taken from the plaintiff's deposition, that go well beyond the very conclusory allegations of the plaintiff's amended complaint. The defendant indicates that it received a credit report from a company known as TRW that indicated that the plaintiff had not paid an outstanding judgment to Household Finance Corporation. That report did not indicate, in any way, that the judgment was the responsibility of the plaintiff's ex-husband. Therefore, the defendant denied the plaintiff a credit card. The plaintiff then called the defendant to inform them that the judgment was the sole responsibility of her ex-husband, and the defendant told her that they would need verification from TRW that the uncollected judgment in fact had nothing to do with her. The plaintiff said that she called TRW, who told her that they could not change their report unless the creditor, Household Finance, reported that the judgment was not

against her. The plaintiff then called the defendant again, and that was her last contact with them before she initiated this lawsuit. She did not even take the time to obtain a certified copy of the judgment to establish to TRW's satisfaction that she was not named in the judgment. By doing so, she could have also established that she was at least a member of the broad class she identified.

The plaintiff did not, either in her original brief or in her reply brief, challenge the statement of facts the defendant recited or give a counter statement of fact of her own. It is clear, however, from the defendant's statement of fact that the plaintiff has a very unique, individual claim, and is not a member of any of the classes that she seeks to represent. In response to the court's questions at oral argument as to how the plaintiff is a member of the classes she seeks to represent, the plaintiff's counsel could only state that the plaintiff was a woman who was denied credit, so that she was a member of the class of all women who were denied credit. The plaintiff has never even indicated, however, what the defendant's practices and procedures are that discriminate against either women or persons with spouses who have had bad credit ratings. The plaintiff, therefore, has not carried her burden of showing that she is a member of the classes she seeks to represent; and we cannot certify those classes.

NOW, THEREFORE, IT IS ORDERED that the plaintiff's motion for class certification be, and the same hereby is DENIED.

/s/ Robert E. DeMascio
United States District Judge

Dated: June 13, 1978

MEMORANDUM AND ORDER

(United States District Court
Eastern District of Michigan
Southern Division)

Eula Mae Denard, Plaintiff, v. Michigan National Corporation, a foreign corporation, and Michigan National Bank, a National Banking Association, d/b/a Michigan BankAmericard, Defendants. No. 7-71352

Pursuant to this court's standing discovery order, the parties have submitted a stipulation detailing their discovery differences. Plaintiff has requested information regarding all applications for Bank Americards or Visa cards since 1971. Defendants object that this information is burdensome to produce, is confidential and protected from disclosure by Rule 26(c)(7). Plaintiff has indicated that she would agree to accept a random selection of 200 applications from this time period to enable her expert to perform a pilot study. Plaintiff also indicates that she would not oppose a protective order restraining her counsel from disclosing this information.

Given the restrictions that plaintiff is willing to accept, we find the request should be granted. It should not be burdensome for defendants to provide the information for 200 applications. Defendants indicate that it takes ten minutes to read and duplicate each application, that the applications are five pages long, and that the cost for duplicating them is ten cents per page. It will thus cost defendants $100.00 to duplicate the applications and less than 40 man-hours to accomplish this task. We further believe that defendants will be fully protected by a protective order limiting access to the data to plaintiff's

counsel and her expert. Defendants are correct that the information may ultimately become part of the record at trial. The names of the applicants, however, need not be disclosed. Counsel can substitute numbers for the names of the applicants and can agree which number corresponds to which individual.

Defendants have sought an order compelling plaintiff to more fully answer ten interrogatories served upon her. We have reviewed the answers plaintiff provided and find most of them to be detailed and responsive. Interrogatories 5, 6, 9 and 10 were not fully answered, and could not be at the time they were propounded because plaintiff had not completed the necessary discovery. Plaintiff has since taken the deposition of Maureen Singleton and seeks to amend her answers to incorporate the entire deposition. This is inadequate. Defendants are entitled to a more specific answer informing defendants what portions of the deposition plaintiff intends to rely on.

Accordingly, IT IS ORDERED that defendants shall, within fifteen days of the date of this order, provide the information requested in plaintiff's Interrogatory number one, filed February 3, 1978 for a randomly selected group of 200 applicants;

IT IS FURTHER ORDERED that the answer to interrogatory one shall be sealed by the Clerk of the Court and shall be disclosed only to counsel involved in this litigation, unless otherwise ordered by the court;

IT IS FURTHER ORDERED that plaintiff's counsel be and the same hereby is restrained from disclosing the answer to interrogatory number one to anyone other than plaintiff's expert Diana Warshay;

IT IS FURTHER ORDERED that within fifteen days of the date of this order plaintiff shall provide complete answers to defendants' Interrogatories five, six, nine and ten, dated January 4, 1978.

ROBERT E. DeMASCIO
United States District Judge

Dated: May 18, 1978
David W. Sinclair, Esq.
Michael E. Cavanaugh, Esq.

BOARD OF GOVERNORS
OF THE
FEDERAL RESERVE SYSTEM

July 1, 1977

Mr. James C. Conboy, Jr.
Legal Officer
Citizens NATIONAL Bank
Cheboygan, Michigan 49721

Dear Mr. Conboy:

This is in response to your letter of April 25 requesting a formal Board interpretation about the impact of Michigan's common-law disabilities on married women's rights under the Federal Equal Credit Opportunity Act (ECOA) and Regulation B. In the staff's opinion, your request does not involve a substantial ambiguity in the regulation. Accordingly, the following is an unofficial staff interpretation of Regulation B.

Your letter refers to certain Michigan statutes* and to Article 10 § 1 of the State Constitution which, in general, regulate the alienation of a married woman's separate prope / (such as her own earnings). In at least one court decision (*City Finance Co.* v. *Kloostra*, 209 NW 2d 498), these laws have been held to permit a woman to disavow an obligation assumed jointly with her husband if it does not benefit her separate estate. You express the belief that a married woman's guarantee of a corporate debt or of a third party's obligation may similarly be unenforceable. Because of this judicial construction, a creditor may discount the income of a married woman in evaluating an application for joint credit. Thus, these laws may have the effect of negating certain rights under the ECOA and Regulation B, and may restrict married women's access to credit.

In your opinion, these laws are inconsistent with and less protective than the ECOA and Regulation B. You ask that the Board declare them preempted under § 705(f) of the ECOA and § 202.11 of the regulation. It is your view that the Michigan Married Women's Acts are not "State property laws" because, in your opinion, their purpose is to recognize a separate legal identity for married women, and also because common-law disabilities do not relate to a desire to regulate property ownership but rather to "a recognition of society's support for the marital relationship and permanence of the family unit."

It is the staff's opinion that the Married Women's Acts are State property laws for purposes of the ECOA and Regulation B since they do, in fact, regulate the manner in which a married woman may alienate her property.

---

* Michigan Comp. Laws §§ 557.1, 557.4, and 557.52-.54 (known collectively as the Michigan Married Women's Acts).

They are similar in concept to State community property and other laws designed to support the marital relationship and, in our view, Congress did not intend to intervene in this area. Consequently, these laws are preserved under § 705(b)(2) of the ECOA, which states that consideration or application of State property laws directly or indirectly affecting creditworthiness does not constitute unlawful discrimination. Section 701(b)(1) of the Act also supports this conclusion. That section states that it is not unlawful to inquire about marital status for the purpose of ascertaining the creditor's rights and remedies applicable to the particular extension of credit.

Since Michigan has enacted a State equal credit law, you may wish to seek a determination from the State Attorney General about the effect of that law on the Married Women's Acts.

I trust this response will be helpful to you. If you have additional questions, please let us know.

Sincerely,

Anne Geary
Chief
Equal Credit Opportunity Section

STATE OF MICHIGAN

FRANK J. KELLEY, ATTORNEY GENERAL

MARRIED WOMEN: Creditworthiness

CIVIL RIGHTS: Equal credit opportunity act

A married woman may bind her separate estate for necessities as well as luxuries.

A creditor who refuses to extend credit or refuses to grant a loan to a woman because of the fact that she is

married is in violation of the Federal Equal Credit Opportunity Acts as well as the 1974 PA 246, since, under Michigan law, a married woman's individual property is subject to levy in payment of her individual debts.

Hon. Gary M. Owen
State Respresentative
Capitol Building
Lansing, Michigan

You have requested an opinion clarifying the relationship between the federal Equal Credit Opportunity Act, 15 USC 1691 (1974) and Michigan law relative to the contractual status of married women. Restated, the question may be posed as follows:

> Under Michigan law, may a creditor refuse to extend credit to a married woman who wishes to individually contract for necessities or luxuries?

The federal Equal Credit Opportunity Act which took effect on October 28, 1975 provides in pertinent part:

> 15 USC 1691.
> "(a) It shall be unlawful for any creditor to discriminate against any applicant on the basis of sex or marital status with respect to any aspect of a credit transaction.
>
> "(b) An inquiry of marital status shall not constitute discrimination for purposes of this title [15 USCS §§ 1691-1691e] if such inquiry is for the purpose of ascertaining the creditor's rights and remedies applicable to the particular extension of credit, and not to discriminate in a determination of creditworthiness.

15 USC 1691d.

"(b) Consideration or application of State property laws directly or indirectly affecting creditworthiness shall not constitute discrimination for purposes of this title [15 USCS §§ 1691-1691e]."

As these sections permit inquiry into marital status in order to ascertain the creditor's rights and remedies under state law, it is necessary to examine existing Michigan property law which could affect a married woman's creditworthiness.

At the common law, a woman had no separate legal existence from her husband and her property either belonged to her husband or was under his control. In addition, she lacked capacity to enter into a contract. Florer, *The Contracts of Married Women in Michigan*, 4 Mich St B J, 99, 100 (1924).

In 1855 the legislature enacted the first of three statutes which eliminated the disabilities of coverture. This act permitted a married woman to hold property in her own name, allowed her to transfer title and prohibited its attachment for her husband's debts. 1855 PA 168, §§ 1-5; MCLA 557.1-557.5; MSA 26.161-26.164. Further, it expressly provided that a woman is liable to be sued on any contract made in relation to her sole estate.

Thus, in *Campbell* v. *White*, 22 Mich 177 (1871) the Michigan Supreme Court held that a married woman residing with her husband and possessed of a separate estate was liable on a contract for merchandise which she contracted for on her individual credit. See also *Hirshfield* v. *Waldron*, 83 Mich 116; 47 NW 239 (1890); *Meads* v. *Martin*, 84 Mich 306; 47 NW 583 (1890).

In 1911, the second of the married women's property statutes became law, 1911 PA 196, § 11; MCLA 557.11; MSA 26.171.

This act granted married woman the right to contract and sue on their own behalf. In 1917 the third and last of this series of statutes was enacted. 1917 PA 158, §§ 1-5; MCLA 557.51-557.55; MSA 26.181-26.185. It enabled married women to become liable on joint contracts with their husbands to the extent of their joint estates.

Thus, within the meaning of Section (b) of 15 USC 1691d, it is clear that a married woman seeking credit for any prupose and being possessed of a separate estate is "creditworthy" if she has a sufficient separate estate to meet the obligations to be incurred. Stated another way, there exists no legal impediment in the law of this state to a creditor's suit against a married woman arising out of disabilities of coverture under the circumstances hereinabove set forth.

It may also be noted that Const 1963, art 10, § 1 provides in pertinent part:

> "*The disabilities of coverture as to property are abolished.* The real and personal estate of every woman acquired before marriage and all real and personal property to which she may afterwards become entitled shall be and remain the estate and property of such woman, and shall not be liable for the debts, obligations or engagements of her husband, and may be dealt with and disposed of by her as if she were unmarried. Dower may be relinquished or conveyed as provided by law." [Emphasis added]

In *City Finance Co* v. *Kloostra*,[1] 47 Mich App 276; 209 NW2d 498 (1973), the court held that while Const 1963, art 10, § 1, *supra*, abolishes all disabilities of coverture denying married women the capacity to enter into contracts, defenses of coverture protecting the married women's separate estate from *joint obligations* remain in force. This decision, however, is consistent with the opinion expressed earlier, i.e. a married woman individually contracting and possessing a *separate* estate is liable on the contract. *Kloostra* involved a *joint debt* between a wife and husband for the purchase of an automobile and only limited the wife's liability for the debt to the *joint estate* of husband and wife.

It may be noted that Michigan, consistent with the federal Equal Credit Opportunity Act, *supra*, prohibits discrimination in rating a person's creditworthiness on the basis of marital status. 1974 PA 246; MCLA 750.147a; MSA 28.344(1) states:

> "(1) A person shall not discriminate in extending credit or granting a loan on the basis of race, color, religion, national origin, marital status, sex, or physical handicap unless that person:
>
> "(a) Is a non-profit corporation whose members share the same:
>
> "(i) racial, religious, ethnic, marital or sexual characteristic; or

---

[1] In *Detroit Newspaper Industrial Credit Union* v *McDonald*, 9 Mich App 146, 156 NW2d 62 (1967), the court, by way of dictum, intimated that Const 1963, art 10, § 1 abolished both the disabilities and defenses of married women in contractual situations.

"(ii) physical handicap; or

"(iii) blend of these characteristics and

"(b) Extends credit or grants a loan only to its members.

"(2) A person shall not discriminate in the rating of a person's creditworthiness on the basis of race, color, religion, national origin, marital status, sex, or physical handicap.

"(3) A person who violates the provisions of subsections (1) or (2) is guilty of a misdemeanor punishable by a fine of not more than $1,000.00.

"(4) A person who violates the provisions of subsection (1) or (2) shall be liable in a civil action to the injured party for the amount of (a) $200.00 or (b) damages, whichever is greater. Actions brought pursuant to rule 208 of the General Court Rules of 1963 shall be limited to those damages provided in subsection (4)(b). The prevailing party in the civil action shall be entitled to recover court costs and reasonable attorney fees. The right of action under this subsection shall be unassignable."

In summary, the defense of coverture only protects a married woman's separate estate from her husband's debts, and there is no legal impediment to the enforcement of a suit arising out of a contractual relationship entered into with a married woman in her own name. It is, therefore, my opinion that the creditworthiness of a married woman is not affected by state property laws and that a married woman is responsibile for her own obligations regardless of whether they are incurred by purchase of a luxury or a necessity.

FRANK J. KELLEY
Attorney General

STATE OF MICHIGAN
FRANK J. KELLEY, ATTORNEY GENERAL

MARRIED WOMEN:	Creditworthiness Disabilities of coverture
CIVIL RIGHTS:	Equal credit opportunity act
CONSTITUTION OF MICHIGAN:	Art 10, § 1 (disabilities of coverture)

The married women's property acts have not been superseded by Const 1963, art 10, § 1; therefore, the separate estate of a wife is not liable for debts of her husband unless consideration has passed directly to her separate estate.

Opinion No. 236

Honorable Gary M. Owen
State Representative
The Capitol
Lansing, Michigan 48909

You have requested my opinion as to whether Const 1963, art 10, § 1 has superseded the married women's property acts[1] to the extent that the separate estate of a married woman may be levied upon to pay joint obligations of the husband and wife even though no consideration flowed to the wife's estate.

OAG, 1975-1976, No 5037, p — (November 8, 1976), held that a married woman may bind her separate estate for necessities as well as luxuries and therefore a creditor may not refuse to extend credit to a woman because of the fact that she is married.

---

[1] 1855 PA 168, §§ 1-5; MCLA 557.1-557.5; MSA 26.161-26.164
1911 PA 196, § 11; MCLA 557.11; MSA 26.171
1917 PA 158, §§ 1-5; MCLA 557.51-557.55; MSA 26.181-26.185.

However, this conclusion does not mean that the defense of coverture may not be raised by a married woman if she has co-signed a note with her husband where no consideration has passed to her separate estate.

In *City Finance Co* v. *Kloostra*, 47 Mich App 276; 209 NW2d 498 (1973), the Court of Appeals dealt with the issue of whether married women's property acts have been superceded [sic] by Const 1963, art 10, § 1, which provides:

> "The disabilities of coverture as to property are abolished. The real and personal estate of every woman acquired before marriage and all real and personal property to which she may afterwards become entitled shall be and remain the estate and property of such woman, and shall not be liable for the debts, obligations or engagements of her husband, and may be dealt with and disposed of by her as if she were unmarried. Dower may be relinquished or conveyed as provided by law."

After carefully reviewing the debates of the Constitutional Convention and appellate decisions dealing with this question, the Court summarized its conclusions in the following terms:

> "Although the married women's property act has gone far toward making a wife the equal of her husband, at least in the eyes of the law, it does not abolish all the common-law distinctions between husband and wife. One of the remaining distinctions is at issue herein: if a married man co-signs a promissory note with his wife, he is jointly and severally liable thereon. That means that any judgment entered on the note may be

statisfied out of any property held jointly with his wife and also out of any property held by him separately, even though the consideration for the note inured solely to the joint estate. On the other hand, if a married woman co-signs a promissory note with her husband, she is jointly liable thereon. That means that judgment entered on the note may be satisfied only out of property held jointly with her husband. The wife's separate estate is not liable, unless consideration for the note passed directly to her separate estate. *Koengeter* v. *Holzbaugh*, 332 Mich 280 (1952).

"This distinction is, in reality, a 'disability of coverture,' for its exists only because the common law denied married women the capacity to make binding contracts and because our Legislature has not completely abrogated the common law. However, because the same incapacity can be used to avoid personal liability once a contract has been made, it is considered by many to be a 'defense of coverture' and as such a protection for married women." 47 Mich App at 284-285

Subsequently, the Court in *City Finance Co, supra*, 47 Mich App 276 at 288; 209 NW2d at 505 stated:

". . . Thus, it is our opinion that those delegates who supported the provision at issue herein had no intention of making married women jointly and severally liable on joint obligations with their husbands."

Thus, although 1974 PA 246; MCLA 750.147a; MSA 28.344(1), prohibits a person from discriminating in the extension of credit on the basis of marital status, this

provision does not overrule by implication the married women's property acts to the extent of denying a defense of coverture where a married women's separate estate has not benefited from the extension of credit. The refusal of a person to extend credit to a husband because the co-signature of his wife is unenforceable is not, in my opinion, a refusal to extend credit based upon the marital status of the husband or the wife. In such a case, the eligibility for credit of each spouse is dependent upon the individual's own credit standing without regard to marital status, there being no legal requirement that a creditor grant credit to a person whose financial status does not warrant the extension of the credit.

Therefore, since, as noted in *Flynn* v. *City of Fraser*, 45 Mich App 346, 349-350; 206 NW2d 448 (1973), repeals by implication are not favored in the law, (see also *Lansing School District* v. *School District No 3*, 327 Mich 436, 440; 42 NW2d 132 (1950)) all of the statutes involved must be given effect.

It is therefore in my opinion that, despite enactment of 1974 PA 246, *supra*, the defense of coverture is available to a married women where a judgment is entered on a joint obligation with her husband unless consideration has passed directly to her separate estate.

FRANK J. KELLEY
Attorney General

December 1, 1980

WOMEN STILL HAVE A HARD TIME GETTING CREDIT

Five years after the Equal Credit Opportunity Act, confusion remains

J'Amy Brown of Dallas, who receives a tax-free annual income of nearly $50,000 from her millionaire husband under a court-ordered separate-maintenance decree, gets turned down whenever she applies for a credit card — because she has no job. Brown, however, has discovered an effective solution to her problem. She threatens to sue. The threat almost always produces a credit card.

But Brown worries about other women who encounter credit bias. "If, with my situation and my income, I can't get credit, what do other women with a lot less money do?" asks Brown. "They must really be in trouble."

Complaints pour in. In fact, many of them are in trouble, despite a law that has theoretically guaranteed their credit rights for the past five years. The Federal Trade Commission, which has primary responsibility for

enforcing the Equal Credit Opportunity Act (ECOA), received 5,000 complaints about credit discrimination last year. Thousands of other complaints go to assorted women's groups and consumer councils. In Philadelphia, the Women's Law Project reports 1,000 credit complaints a year. A hotline of the Women's Credit Rights Project at the University of Southern California logged 8,000 calls in the past two years.

The ECOA was passed specifically to protect women from unfair screening practices based on sex or marital status when they apply for loans, bank cards, or retail credit. A later amendment outlawed credit bias based on reasons of age, race, religion, or other factors. Political scientist Emily W. Card, founder of the USC project, and now on a fellowship at Harvard University, believes that "the law without question has put an end to gross overt policies that held that lending to women was bad business." But this change benefits mainly those women who have established credit since the law's passage, she says. Many women over 25 "are falling outside the net," Card says.

Especially vulnerable, says Card, are married women who had joint credit accounts before 1977, when lenders issued a one-time notice informing joint-account holders of their right to separate credit ratings. Women who took no action to have their credit reported separately (and apparently most joint-account holders took none) are discovering they have no credit in their own names if they are divorced or widowed. A married woman may still order a creditor or reporting agency to record the credit history in her name as well as her husband's, but widowed or divorced women are less fortunate. "A creditor does not have a clear obligation to honor credit in the name of a woman's former or deceased spouse,"

warns L. Jean Noonan, the FTC's program adviser for ECOA; the act merely asks him to consider such credit "where available."

'A rigid mentality.' Women also run into trouble when management's willingness to comply with the ECOA fails to filter down to the employees who actually decide an applicant's eligibility. "I'm convinced that at the policy level most lenders want to comply with the law," says Card, who helped draft the ECOA. "But for a loan officer who has been making loans the same way for 15 to 20 years, it's a matter of changing a rigid mentality."

Even more troublesome is the growing is the growing use of credit-scoring systems by large creditors such as department stores and oil companies, says the FTC. The commission feels that the systems may perpetuate previous patterns of bias.

As written, the ECOA prohibits the common practices that formerly assigned a lesser status to a creditworthy woman than to a creditworthy man. Among other provisions, creditors may not refuse a married woman her own account if she qualifies for credit, nor may they deny credit to an individual because of the unfavorable credit history of a spouse. They are barred from asking about a woman's birth-control practices or childbearing plans, factors previously used as evidence that a woman's income was unstable and therefore a risky basis for credit. They are also forbidden to require a cosigner when a woman's individual credit history qualifies her for credit, at least outside the eight community-property states that give each spouse a right to the other's income.

These provisions, however, are not necessarily honored. "The problem is that women are not aware of

their rights or what to do," say Sharon Leventhal, executive director of the Colorado Center for Women & Work in Denver.

Applying elsewhere. But even women who know the law may have neither the time nor the money to pursue expensive, protracted lawsuits. Says Los Angeles lawyer Julie I. Bornstein: "To prove a case, you have to prove you're creditworthy. If you can do that, chances are that you can get the loan or the credit card from another lender, with a lot less trouble than going to court."

Bornstein speaks from experience. Three years ago she was denied a $30,000 bank loan to open a law practice with a male partner, after having paid off previous unsecured loans for similar amounts. "I was five months pregnant, and that that was a killer," she says. "The lending officer said we could have a loan only if it were secured by my house." Instead of pressing the case, however, Bornstein went to another lender, who advanced the money.

Knowing rights. In another instance, a Connecticut woman wrote a letter to a company that had denied her a credit card, outlining her rights and noting that a carbon

The ECOA generates little litigation. Cases often end in consent agreements.

copy was going to the state's Permanent Commission on the Status of Women. She promptly received a credit card. The Connecticut Commission on Human Rights & Opportunities, which received 30 credit complaints in fiscal 1980 (most of which were settled before the Commission reached a finding), believes that the 30 represent a small fraction of the possible violations that

were committed. Some recalcitrant lenders back down and some rejected borrowers either try a more cooperative lender or fail to complain out of ignorance, the commission says.

In some cases, however, what appears to be discrimination is actually poor communication. "Banks are not totally communicating with women," says Norman J. Neuhalfen, vice-president of the Women's Bank in Denver. "They turn them down for loans, but never explain why." Investigation often reveals that the women genuinely failed to meet the bank's credit standards, says Neuhalfen. Refusal to explain a turndown also violates the ECOA.

Whatever the reason, the act has generated remarkably little litigation. The ECOA is just one part of the Consumer Credit Protection Act, which also includes the 1972 Truth-in-Lending Act. The ECOA has produced perhaps 200 lawsuits resulting in about 25 opinions, says Washington lawyer Warren L. Dennis, while Truth-in-Lending produced more than 20,000 federal and state cases. Moreover, ECOA cases tend to result in consent agreements rather than precedent-setting judicial decisions.

Difficult to prove. "The paucity of reported cases is a sign that the act is working," says an attorney for a Michigan bank that has twice successfully defended itself against charges of credit bias. Others blame the difficulty of proving willful discrimination for the small number of cases. "Unless the offense is blatant, it's very difficult for a private individual to prove a pattern of discrimination," says Margaret Standish, executive director of the Playboy Foundation in Chicago. Standish chose to settle her credit card complaint against American Express Co. out of court.

Litigating the ECOA is complicated for both sides. In *Harbaugh vs. Continental Illinois Bank & Trust Co. of Chicago*, Helen D. Harbaugh of Arlington Heights, Ill., completed a credit card application sent, unsolicited, to her husband. Although she typed "Mrs." in place of "Mr.," the bank issued the card in the name of John P. Harbaugh. Six years later the Seventh Circuit Court of

Courts regard credit as a luxury. Compensatory damages are small.

Appeals upheld a lower court ruling against Harbaugh, saying that the lender has no duty to recognize the altered title or to notify the applicant of its practice of deleting titles.

Mrs. Harbaugh, a 65-year-old retired schoolteacher who eventually got the card in her own name, describes the case as "sort of a cause." Says Harbaugh: "When I realized that even with the new laws I wasn't going to get my own card, I said: 'If this is the way the computer works, the computer should be changed.' " The bank says it regrets the whole incident. "It cost a ton of money," says Continental Vice-President James A. Matthews: "I wish to God somebody had caught the error early enough to prevent it." But Matthews admits that the bank has not changed its system.

A luxury item. Under the ECOA, plaintiffs must be motivated mainly by indignation since the prospect of financial reward — or even breaking even — is slight. In the few cases in which courts granted punitive damages, the sum fell well below the $10,000 limit authorized by the act, and the case for compensatory damages is hard to prove. Convincing a judge that a credit refusal has harmed the plaintiff is uphill work when credit is frequently considered a luxury rather than a necessity.

The FTC, the most vigorous challenger to creditors under the ECOA, has obtained only three consent decrees since its first victory against Bloomingdale Bros. in New York City in early 1978. The commission extracted a $50,000 civil penalty from the department store on charges that it failed to consider income from alimony and child-support payments on credit applications and failed to provide specific reasons for credit denials.

At present, credit-scoring systems are the primary target of FTC action. Used by creditors too large to judge applications individually, the systems rate credit applicants according to characteristics linked to good credit behavior in the past. If the best credit performers have been homeowners, for example, the homeowner characteristic will raise the score of an applicant and its absence will tend to eliminate nonhomeowners from consideration. "This can create a system that's inherently biased," argues Washington attorney Dennis, because it raises the odds against granting credit for just those groups that formerly had little credit, such as women.

Responding to a spate of requests for clarifications from major users of scoring systems such as Citicorp,

---

The Federal Reserve requires creditors to give reasons for turndowns.

Mobil, Sears, and J.C. Penney, the Federal Reserve Board (another of the 12 agencies that share ECOA enforcement) has begun to issue guidelines. One specifies that secondary income, such as alimony and child support, may not be scored differently from any other income. Another — replying to creditors'

arguments that they cannot identify specific reasons why an applicant is denied credit under a scoring system — directs creditors to reveal those reasons that the rejected applicant can most easily change in order to qualify for credit.

A future for scoring systems. Most observers believe that the Fed will call for further modifications of the scoring systems but will stop short of ordering their elimination. Fair Isaac & Co. of San Rafael, Calif., the nation's largest supplier of scoring systems, expects its business to continue growing 10% to 20% annually.

Meanwhile, women continue to encounter credit obstacles far more elementary than credit-scoring systems. Nancy Hodges, a divorced woman who runs a Houston talent agency, recently applied for a $5,000 bank loan to expand her business. She prepared an optimistic, 73-page financial prospectus for the forthcoming year but was turned down by three banks on the ground that she had no collateral. On her fourth try at a small Houston bank, Hodges reports, the loan officer admired her prospectus and said: " 'What you need, honey, is a sugar daddy. Go out and find yourself a nice boyfriend, and we'll take care of it.' " Hodges took her case to the local office of the National Organization for Women. But NOW officials advised against legal action. The loan officer undoubtedly would deny that he had made the remark and cite financial reasons for refusing the loan, they said.

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EXCERPT FROM RESPONDENT'S CREDIT MANUAL

> A credit report is mandatory on all screened applications. If the report shows any derogatory listings within a *three-year period*, the application would normally be rejected. *In some instances, a satisfactory explanation can be obtained from the customer, or by direct clearing.*
>
> * * *
>
> For the purposes of determining past credit experience, consider the credit history for which an applicant was contractually liable with a join [sic] applicant or any credit history on which the applicant was an authorized user.
>
> If we can verify that the applicant had no part in a poor credit history, it should not be considered in the final decison. (A767) (emphasis added).

EXCERPT FROM AFFIDAVIT OF DIANA WARSHAY, PH.D. IN RECORD

10. Any person or organization concerned with the equitable treatment of men and women credit applicants, as well as those with spouses or former spouses and without spouses or former spouses over a period of years would have made themselves aware of any possible differences in treatment of these groups by keeping comparative data and inspecting the data on a regular basis.

11. Any person or organization concerned with the equitable treatment of these groups would keep records of the following: numbers and percentage of applicants

for credit who are of each group, numbers and percentage of each group to whom credit is extended of those who have applied, numbers and percentage of each group placed on different credit limits, and numbers and rates of rejection for each category of reason for rejection for each group.

12. The compilation of such records on a regular basis through commonly used techniques, whether manual, mechanical, or electronic, would be relatively easy and inexpensive to implement and maintain.

13. Failure to keep and inspect such records would be a serious dereliction of duty on the part of any person or organization concerned with the equitable treatment of these groups.

14. Failure to keep and inspect such records could indicate an active avoidance of the knowledge that, over a period of years, treatment of the groups may not have been equitable.

15. Discrimination, in sociological terms, is the inequitable treatment of one or more groups or persons on the basis of irrelevant criteria, such as race, sex, religion or marital status. Failure to keep and inspect such records would disenable any person or organization concerned with the equitable treatment of these groups from evaluating and correcting the cause of such discrimination, (A110-111).

CONGRESSIONAL HISTORY REGARDING APPLICATION OF PRINCIPLES IN *GRIGGS* V. *DUKE POWER CO.* AND *ALBEMARLE PAPER CO.* V. *MOODY*

> In determining the existence of discrimination . . . courts or agencies are free to look at the effects of a creditor's practices as well as the creditor's motives or conduct in individual transactions. Thus, judicial constructions of anti-discrimination legislation in the employment field, in cases such as *Griggs* v. *Duke Power Company*, 401 US 424 (1971), and *Albemarle Power Company* v. *Moody* (U.S. Supreme Court, June 25, 1975), are intended to serve as guides in the application of this Act, especially with respect to the allocations of burdens of proof. Senate Report No. 94-589, pp. 4-5, of the Committee, on Banking, Housing and Urban Affairs.

CONGRESSIONAL HISTORY REGARDING BOTTOM-LINE TEST

Senate Report No. 93-278, p. 16, of the Committee on Banking, Housing and Urban Affairs:

> The Committee has recommended Title III to remedy the problem of widespread discrimination on the basis of sex and marital status in the granting of credit to women.* * * The hundreds of personal individual complaints established a clear pattern of discrimination across the country and on an institutionalized level.

The discriminatory acts documented by the Commission were summarized as follows:

1. Single women have more trouble obtaining credit, especially mortgage credit, than single men.

2. Creditors generally require a woman who has credit to reapply for credit when she marries, usually in her husband's name. Similar reapplication is not asked of men when they marry.

3. Creditors are often unwilling to extend credit to a married woman in her own name.

4. Women who are divorced or widowed have trouble reestablishing credit. Women who are separated have a particularly difficult time since their accounts may still be in the husband's name.

5. Creditors are often unwilling to count the wife's income when a married couple applies for credit.

The following are examples of practices constituting discrimination on the basis of sex or marital status if applied to an applicant who is otherwise creditworthy by virtue of willingness and ability to repay any obligations. Each discriminatory act may be applicable to consumer credit of any type, e.g., credit cards, credit accounts, secured or unsecured loans, mortgage loans, etc.:

1. Holding women and men to different standards in determining creditworthiness, e.g., minimum salary level (without regard to individual obligations), length of employment, length of residence, etc.

2. Requiring a newly married woman whose creditworthiness has otherwise remained the same to reapply for credit as a new applicant. (A name change should merely require execution of a new signature on a truth-in-lending disclosure statement.)

3. Refusing to extend credit to a married woman in her own name, even though she would be deemed creditworthy if unmarried.

4. Refusing to count a wife's income when a married couple applies for credit, including jointly held credit cards or accounts, secured or unsecured loans, and mortgage loans. This practice includes but is not limited to arbitrary discounting of a wife's income.

5. Refusing to extend credit to a newly separated or divorced woman solely because of her change in marital status.

6. Arbitrary refusal to consider alimony and child support as a valid source of income where such source is subject to verification.

7. Applying stricter standards in the case of married applicants where the wife rather than the husband is the primary family supporter.

8. Requesting or using information about birth control practices in evaluating any credit application.

9. Requesting or using information concerning the creditworthiness of a spouse where an otherwise creditworthy married person applies for credit as an individual.

10. Refusing to issue separate accounts to married persons where each would be creditworthy if unmarried.

11. Considering as "dependents" spouses who are employed and not actually dependent on the applicant.

12. Use of credit scoring systems that apply different values depending on sex or marital status.

13. Altering an individual's credit rating on the basis of the credit rating of the spouse.

Women have encountered a variety of problems in obtaining credit. Women with history of employment have been denied credit without their husbands' signatures, even though they had substantial earnings. Women have been denied credit when employed although their unemployed student husbands could obtain credit. When seeking to obtain information about mortgage loans, single women have faced situations where no pertinent information concerning length of employment, length of residence, income, or age were asked, but they were flatly informed that mortgage loans were not granted to single persons without cosigners. In one case, a woman in her forties who as head of her household wanted to buy a house for herself and her children and could not get a mortgage without the signature of her 70 year old father, who was living on a pension.

In addition to evidence from individual women, several studies have been conducted to document discrimination on a systematic basis. A study

conducted by the St. Paul, Minnesota, Department of Human Rights was directed at precisely this question. A man and a woman with identical qualifications applied for a $600 loan to finance a used car without the signature of the other spouse. Each applicant was 24 years old earning $12,000 as a research analyst, and the spouse was in school. Eleven of the 23 banks visited by the woman either strictly required the husband's signature or stated that it was their preference, although they would accept an application and possibly make an exception to the general policy. When the same 11 banks — plus two additional banks that would make no commitment to the female applicant — were visited by the male interviewer, six said they would prefer both signatures but would make an exception for him; only one insisted on both signatures; and six told the male interviewer that he, as a married man, could obtain the loan without his wife's signature.

Based on these responses, the St. Paul Department of Human Rights estimated overall that approximately 39 percent of the banks interviewed revealed discrepancies in the loan policies stated to males and females.

It is this kind of discrimination, not the right of banks to insure their loans, that the Committee is trying to overcome through the proposed legislation.

CONGRESSIONAL HISTORY REGARDING SOUND EVALUATION OF CREDIT APPLICATIONS

The evaluation of credit applications is by nature a discriminatory process whereby the creditor must determine the expendable income or assets of the individual in light of his or her fixed or anticipated obligations. This type of discrimination is rational and merely involves the application of ordinary credit criteria. However, when a creditor fails to apply ordinary criteria merely because an applicant is a woman, or a person has experienced a change in marital status, or an applicant is denied credit merely because of characteristics resulting from sex or marital status, but unrelated to creditworthiness, then that discrimination has no rational basis and must be prohibited by law. Discrimination in the extension of credit occurs when a credit applicant is not evaluated pursuant to a creditor's ordinary credit criteria, but is judged — and frequently denied credit — not individually, but because of membership in a class.

Senate Report, 93-278., p. 19.

The importance of credit in our society was emphasized by Arthur S. Flemming, Chairman of the U.S. Commission on Civil Rights, in testimony before the Consumer Affairs Subcommittee:

> It would be difficult to exaggerate the role of credit in our society. Credit is involved in an almost endless variety of transactions reaching from the medical delivery of the newborn to the rituals associated with the burial of the dead. The

> availability of credit often determines an individual's effective range of social choice and influences such basic life matters as selection of occupation and housing. Indeed, the availability of credit has a profound impact on an individual's ability to exercise the substantive civil rights guaranteed by the Constitution."

Your Committee believes that H. R. 6515 is a landmark legislation. As Dr. Flemming stated, the legislation:

> . . . promises to halt discrimination on the basis of race, color, religion, national origin and age in the granting of credit. Unlike the broad prohibitions contained in the Civil Rights Act of 1866, H. R. 3386 (H. R. 6516) forbids discrimination based on race, color, religion, national origin and age in all areas of credit not just mortgage finance.

It has been stated that credit is a privilege, not a right, and your Committee does not dispute this. Nevertheless, no one has the right arbitrarily to deny an individual credit on the basis of factors such as race, religion, national origin, age, sex or marital status.

House Report of the Committee on Banking, Currency and Housing No. 94-210, p. 3.

Credit has ceased to be a luxury item, either for consumers or for business entrepreneurs. Consumer credit outstanding continues to grow at a phenomenal pace and now stands slightly below $200 billion, not even counting 1-4 family mortgage credit which would add more than $400 billion to that total. Virtually all home purchases are made on

credit. About two-thirds of consumer automobile purchases are on an installment basis. Large department stores report that 50% or more of their sales are on revolving or closed-end credit plans. Upwards of 15% of all consumer disposable income is devoted to credit obligations other than home mortgages.

In this circumstance, the Committee believes it must be established as clear national policy that no credit applicant shall be denied the credit he or she needs and wants on the basis of characteristics that have nothing to do with his or her creditworthiness. The Committee readily acknolwedges that irrational discrimination is not in the creditor's best interests because it means he is losing a potentially valuable and creditworthy customer. But, despite this logical truth, the hearing record is replete with examples of refusals to extend or to continue credit arrangements for applicants falling within one or more of the categories addressed by this bill.

Senate Report No. 94-589, p. 3.

PROPERTY SETTLEMENT CLAUSE IN PETITIONER'S JUDGMENT OF DIVORCE

The standard Property Settlement clause of the Judgment of Divorce entered on July 11, 1975 provided:

> IT IS FURTHER ORDERED AND ADJUDGED that each of the parties hereto shall retain as his or her own, free and clear of any rights, title or interest of the other, all of the property presently in her or his possession.

MICHIGAN CONSTITUTIONAL HISTORY OF MARRIED WOMEN'S PROPERTY ACT

Delegate Catherine Cushman also spoke of the need to protect married women:

> "Mr. Chairman and fellow delegates, this is a fine subject for joking, but I think there has been enough joking about it. All joking aside, women still need the protection of this section. Socially and economically, women are still in a disadvantaged position, as any intellectually honest person will acknowledge. Women generally find it more difficult to get higher paid jobs. Statistics show this very clearly. The governor just yesterday signed a bill that provides equal pay for women for equal work. The fact that only 11 out of 144 delegates in this convention are women indicates that they are at a disadvantage politically as well. Our social attitudes change, very clearly. This is not to say that women are not building a better position for themselves in this world; but at the present time they are in a disadvantaged position. The common law provides for a disadvantaged position for women, and there is no doubt in my mind that they need this type of protection. Thank you." 2 Official record, Constitutional Convention 1961, p 2443.

The "defense of coverature" which insulates a married woman's separate estate from the debts of marriage seems to be just the type of "protection" the quoted delegates were attempting to provide. If a husband dies, becomes incapacitated, or abandons his family responsibilities, his wife and children are more secure if the wife's separate

estate, at least wages, is completely available to meet current expenses. Thus, it is our opinion that those delegates who supported the provision at issue herein had no intention of making married woman jointly and severally liable on joint obligations with their husbands. at Mich. App 288; N.W.2d 504-505.

CONGRESSIONAL HISTORY REGARDING CLASS ACTION ENFORCEMENT

Comments of Senator Hart on 1973 bill amending T.I.L.A. and enacting E.C.O.A.:

> The actual damages resulting from abuses of disclosure, billing practices, and discrimination are usually negligible or extremely difficult to prove. For that reason, we set up a minimum award of $100 for an individual action in our original act. But lawyers' fees and the costs of suits are such that the only truly effective means of enforcing the sound provisions of this act is by class suits. Since the courts have refused to certify class suits under the Truth in Lending Act as it now stands, it is necessary to enact some limitation. But the limitation has to be realistic.
>
> * * *
>
> The Federal Reserve Board, intimately familiar with the structure of the credit industry, recommended that the maximum be set at the greater of $50,000 or 1 percent of net worth. They emphasized "the prophylactic effect of the threat of class action exposure. That threat elevates a possible truth-in-lending lawsuit from the ineffective

nuisance category to the type of suit which has enough sting in it to insure that management will strive with diligence to achieve the compliance."

This limit does have teeth in it. It is obvious that few judges would actually award a sum totaling 1 percent of the net worth of American Express, Bank of America, Montgomery Ward's, or Sears Roebuck. But he will have the discretion to award a sum which such institutions will feel and will have to justify to their stockholders.

All the other laudatory provisions of the Truth-In-Lending Act, and the amendments we are considering here today, will be lost without a sanction. This amendment may seem technical at first glance, but in my view it represents the very heart of our whole endeavor to correct credit abuses in this country.

The equal credit opportunity section forbidding discrimination because of sex and marital status in credit decisions, is another important step forward. Some banks and credit card companies seem to have the view that the worth of money depends on the sex of the person who earns it. I cosponsored Senator Brock's bill dealing with sex discrimination in credit practices, and I am delighted that the full Banking Committee accepted it. 119 Cong. Rec. 25410.

Federal Reserve Board recommendation:

> [The Board] . . . believes that potential class liability is an important encouragement to the voluntary compliance which is so necessary to insure nationwide adherence to uniform disclosure. Consequently, it believes that any inquiry into the justification for class actions

should not be restricted to whether the possible liability in such suits exceeds the actual damages suffered by the class members. Equally important in the Board's view, is the prophylactic effect of class action exposure. That threat elevates a possible Truth-in-Lending lawsuit from the ineffective 'nuisance' category to the type of suit which has enough sting in it to insure that management will strive with diligence to achieve compliance. 119 Cong. Rec. 25415.

Senate Committee on Banking, Housing and Urban Affairs, separate views of Senators Tower, Bennett, and Brock:

> In enacting the Truth-In-Lending Act, Congress provided for criminal liability for certain violations and distributed administrative enforcement authority among several Federal agencies. In addition, private litigation was intended to be a primary mechanism for inducing compliance. Thus Congress supplied specific remedies nor the private enforcement of the Act including multiple damages of twice the amount of the finance charge in connection with the transaction, minimum damages of $100, and reasonable attorney's fees as determined by the court. The inclusion of these inducements for private enforcement has given rise to several problems the most pressing of which is the application of the civil penalty provision in a class action.
>
> * * *
>
> The Court in *Ratner* v. *Chemical Bank of New York Trust Company*, 54 FRD 412 (S.D.N.Y. 1972) was the first to analyze specifically the question of the

propriety of a class action to recover on behalf of each member the minimum statutory amount provided in the Act. The defendant in the *Ratner* case argued that the incentive of class action benefits was unnecessary because the Act provides for the recovery of a minimum $100 penalty and the payment of costs and reasonable attorney's fees, and that to allow the recovery of the $100 statutory penalty for each class member would result in horrendous and annihilating punishment unrelated to any actual damages suffered by members of the purported class or to any benefits realized by the defendant, for what was at most a technical and debatable violation of the Act. The court found the defendant's arguments persuasive, and concluded that the certification of the *Ratner* action as a class action would have been inconsistent with the specific remedy provided by Congress. With at least twenty-one district court decisions following the *Ratner* logic in refusing to certify Truth-in-Lending class actions, the trend has been away from allowing class actions to enforce compliance with the Act.

In light of this background, the consumer groups have urged Congress to take action that would clearly authorize class action suits without limitation. The retailers and bankers testified that they do not want to take a chance on a potential liability that could be catastrophic for even the largest firms. They urged the Committee to place a dollar limitation on recovery. On the other hand, the consumer finance industry feels that the courts are fashioning a reasonable rule

governing class action suits and at this time want no congressional intervention.

The Committee adopted the civil liability section in S. 914 after limiting class action recovery to $100,000 or One (1%) per centum of the net worth of the creditor, whichever is the lesser. This is a reasonable approach in that it places a sufficient deterrent on large firms without placing in jeopardy the survival of small firms. Senate Report 93-278, pp. 422-423

Majority report of the Senate Committee on Banking, Housing and Urban Affairs of June 25, 1973 (S. Rep. No. 93-278):

Section 130 of the Truth in Lending Act permits consumers to bring civil actions in the Federal courts against any creditor who fails to disclose the information required by the Act or the regulations thereunder. Since it is difficult to prove any actual monetary damage arising out of a disclosure violation, the Act provides that a consumer bringing a successful action is entitled to collect court costs and reasonable attorney's fees plus twice the amount of the finance charge but not less than $100 nor more than $1,000.

A problem has arisen in applying these minimum liability provisions in class action suits involving millions of consumers. If each member of the class is entitled to a minimum award of $100, a creditor's liability can be enormous. For example, if a large national depqrtment store chain with Ten (10) Million customers fails to include a required item of information on its monthly

billing statement, it can be subject to a minimum liability of One Billion in a class action suit.

The leading case in construing the applicability of the minimum liability provisions under Section 130 to class actions suits is *Ratner* v. *Chemical Bank of New York Trust Co.*, 54 F.R.D. 412 (S.D.N.Y. 1972). In the *Ratner* case, Judge Frankel decided that the action by one cardholder would not lie as a class action, stating that, "The allowance of thousands of minimum recoveries like plaintiff's would carry to an absurd and stultifying extreme the specific and essentially inconsistent remedy Congress prescribed as the means of private enforcement." In refusing to maintain the *Ratner* case as a class action pursuant to Rule 23 of the Federal Rules of Civil Procedure, the court also emphasized that it was only deciding the applicable case at hand and was not ruling on the defendant's more sweeping contentions that no class actions were authorized under section 130 of the truth in Lending Act.

Prior to the *Ratner* decision on February 14, 1972, the courts affirmed 8 Truth in Lending suits as class actions while denying class action status to 3. Since the *Ratner* case, the courts denied 21 Truth in Lending suits class action status while affirming only one in that case only after the plaintiffs amended their complaints to sue only for actual damages. Despite this record, many creditors fear a future court may still certify a Truth in Lending suit for class action status and subject the creditor involved to a potentially staggering penalty. At the same time it is clear that consumers have not obtained much relief because of the courts' reluctance to impose

the unreasonably large minimum penalties provided for under section 130 of the Truth in Lending Act.

The purpose of the civil penalties section under Truth in Lending was to provide creditors with a meaningful incentive to comply with the law without relying upon an extensive new bureaucracy. However, the Committee feels this objective can be achieved without subjecting creditors to enormous penalties for violation which do not involve actual damages and may be of a technical nature. Putting a reasonable limit on a creditor's maximum class action liability would seem to be in the best interests of both creditors and consumers.

In reviewing alternative solutions to the problem, the Committee considered a proposal to leave the present law unchanged. This approach was advocated by the finance company industry on the theory that class action suits under Truth in Lending other than for actual damages were inappropriate, were not specifically authorized by the Truth in Lending Act, and would be ultimately held to be illegal per se by the courts.

This approach was not approved by the Committee. The committee believes the present ambiguities and uncertainties with respect to class action suits under Truth in Lending should be clarified. Moreover, the Committee agrees with the Federal Reserve Board that potential class action liability is an important encouragement to the voluntary compliance which is so necessary to secure "nation-wide adherence to uniform disclosure" and that such

remedies should not be restricted to actual damages. As the Committee pointed out in its report on similar legislation last year, "Most Truth in Lending violations do not involve actual damages and . . . some meaningful penalty provisions are therefore needed to insure compliance."

Accordingly, the Committee again decided to place an aggregate limitation on a creditor's class action liability for violations not involving actual damages.

* * *

The Committee believes a maximum class liability of $100,000 is sufficient to deter potential violations and achieve widespread compliance.

Senate Report (Banking, Housing and Urban Affairs Committee), No. 94-590, p. 8:

The chief enforcement tool will be private actions for actual damages and civil penalties. Much of the testimony received in the hearings and much of the debate in Subcommittee and Committee centered on the adequacy of the recovery ceiling for civil penalties in class actions. The present law sets that ceiling at the lesser of $100,000 or One (1%) per centum of the creditor's worth, whichever is less.

The setting of any ceiling on class action liability is meant to limit the exposure of creditors to vast judgments whose size would depend on the number of members who happened to fall within the class. The risk of any ceiling on class action recoveries is that, if it is too low, it acts as a

positive disincentive to the bringing of such actions and thus frustrates the enforcement policy for which class actions are recognized. Under the present Truth in Lending Act, where the class action ceiling is $100,000 several courts have noted the incompatibility of that ceiling with the effective use of the class action. *Boggs* v. *Alto Trailer Sales, Inc.*, (NO. 74-1605, 5th Cir. April 14, 1975); *Weathersby* v. *Fireside Thrift Co.*, (NO. C-73-0563 AJZ, N.D. Cal. February 25, 1975).

The Committee wishes to avoid any implication that the ceiling on class action recovery is meant to discourage use of the class action device. The recommended $500,000 limit, coupled with the One (1%) per cent formula, provides, we believe, a workable structure for private enforcement. Small businesses are protected by the 1% measure, while a potential half-million dollar recovery ought to act as a significant deterrent to even the largest creditor.

S.R. 94-589, pp. 13-14:

Since discrimination is inherently insidious, almost presumptively intentional, yet often difficult to detect and ferret out, the Committee believes that strong enforcement of this Act is essential to accomplish its purposes.

* * *

The chief enforcement tool . . . will continue to be private actions for actual and punitive damages. Much of the testimony received in the hearings, and much of the debate in Subcommittee and Committee centered on the adequacy of the recovery ceiling for punitive damages in class

actions.The present law sets that ceiling at the lesser of $100,000 or 1% of the creditor's net worth. The Subcommittee had recommended that this be changed to the greater of $50,000 or 1%. The Committee eventually agreed upon a level of $500,000 or 1% of the creditor's net worth, whichever is less.

The setting of *any* ceiling on class action liability is meant to limit the exposure of creditors to vast judgments whose size would depend on the number of members who happened to fall within the class. The *risk* of any ceiling on class action recoveries is that, if it is too low, it acts as a positive disincentive to the bringing of such actions and thus frustrates the enforcement policy for which class actions are recognized.

In the context of this Act, where individual recoveries of punitive damages could be as high as $10,000, a $100,000 ceiling tends to discourage the bringing of a class action whenever there are more than 10 members in the class. In a parallel situation under Truth in Lending, where the class action ceiling is also $100,000, several courts have noted the incompatibility of that ceiling with the effective use of the class action device. *Boggs* v. *Alto Trailer Sales, Inc.* (No. 74-1605, 5th Cir., April 14, 1975); *Weathersby* v. *Fireside Thrift Co*, (No. C-73-0563 AJZ, N.D. Calif., Feb. 25, 1975).

The Committee wishes to avoid any implication that the ceiling on class action recovery is meant to discourage use of the class action device. The recommended $500,000 limit, coupled with the 1% formula, provides, we believe, a workable structure for private enforcement. Small businessmen are protected by the 1% measure, while a potential half million dollar recovery ought to act as a significant deterrent to even the largest creditor. . . ."